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IN THE

Supreme Court of the United States

1971 TERM

DOCKET NO. 71-1563

ANGELO DECARLO, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction of the Supreme Court	2
The certified record	2
Questions presented	2
Constitutional and statutory provisions involved	3
Statement of the case	4
Reasons for granting the writ	7
1. The decision below conflicts with the decision of the Court of Appeals for the First Circuit with regard to the service of interrogatories upon the jurors	7
2. The decision below is sufficiently important for the Supreme Court to review because the deliberate misconduct of the prosecutor, which was allowed by the trial court and sanctioned by the decision below, has raised important questions of constitutional law which should be settled by this Court	13
3. The decision below is exceptionally important for the Supreme Court to review, because it provides an opportunity for the Court to settle important questions of constitutional law which concern standards of proper conduct for trial judges and prosecutors	17
Conclusion	21
Appendixes	1a
A. A photo copy of one of the twelve Interrogatory forms served upon the twelve jurors	1a
B. Copy of the unanimous opinion by Circuit Judge Aldisert for the three-judge panel of the Court of Appeals below filed August 6, 1971, reversing the judgment of conviction	3a

Page

C. Copy of the Court of Appeals order allowing a rehearing *en banc* 17a

D. Copies of opinion of the Court of Appeals *en banc* affirming the judgment of conviction, concurring opinion, and two dissenting opinions filed April 4, 1972 ..... 18a

E. Judgment of the Court of Appeals *en banc* filed April 4, 1972 ..... 49a

F. Summary of the prejudicial publicity contained in The Newark Evening News, The Newark Star-Ledger, and The New York Times during the trial 50a

G. Constitutional and Statutory Provisions Involved 59a

CITATIONS

CASES:

Berger v. *United States*, 295 U.S. 78 (1935) 16

Bollenbach v. *United States*, 326 U.S. 607 (1946) 15, 16

Illinois v. *Allen*, 397 U.S. 337, reh. den. 398 U.S. 915 (1970) 17, 18

Pamplin v. *Mason*, 364 F.2d 1 (5th Cir., 1966) 20

United States v. *Spock*, 416 F.2d 165 (1st Cir., 1969) 7, 11, 12

STATUTES:

18 U.S.C. sec. 892, 894 6

18 U.S.C. sec. 3231 4

RULES:

Federal Rules of Criminal Procedure 10

MISCELLANEOUS:

Conduct of counsel for the prosecution, 23A C.J.S. Crim. Law sec. 1081 17

Verdicts in federal criminal cases, 8 Moore's Federal Practice, Par. 31.02 [3] (1972) 12

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The petitioner, Angelo DeCarlo, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit *en banc* entered in this proceeding on April 4, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals *en banc*, not yet reported, which affirmed the judgment of conviction, appears in Appendix D hereto. This is the opinion which is sought to be reviewed.

The opinion of the three-judge panel, not yet reported, which originally decided the case on appeal and unanimously reversed the judgment of conviction, appears in Appendix B hereto.

JURISDICTION OF THE SUPREME COURT

The judgment of the Court of Appeals for the Third Circuit was entered on April 4, 1972 after a rehearing *en banc*. Upon the petitioner's application for an extension of time to file a petition for writ of certiorari, Mr. Justice Brennan, on April 28, 1972, ordered that the time for filing a petition for writ of certiorari is extended to and including June 3, 1972, and this petition for certiorari was filed within the extended time. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1254 (1).

THE CERTIFIED RECORD

Mr. Daniel Cecere was a party to the proceeding in the court below and a co-defendant at the trial in the United States District Court for the District of New Jersey. He has filed a separate petition for writ of certiorari (Supreme Court Docket No. 71-1438). We have been advised by the Clerk of the Court of Appeals for the Third Circuit that counsel for Mr. Cecere has requested that the certified record of the proceedings of the United States District Court be filed in the Supreme Court.

QUESTIONS PRESENTED

1. The trial judge served interrogatories upon the jurors to take into the jury room and His Honor made it clear as to what answer he expected the jurors to give. Were not the service of interrogatories upon the jurors and the trial judge's instructions and comments

with regard thereto improper and coercive, and a deprivation of the petitioner's constitutional right to due process and trial by jury?

2. The prosecutor introduced evidence of the circumstances of the death of a prospective witness. Did not the introduction of such highly prejudicial evidence deprive the petitioner of his constitutional right to a fair trial?

3. Was not the petitioner deprived of his constitutional right to the effective assistance of counsel by the personal attacks conducted by the trial judge and the prosecutor upon the attorneys for the defense during the trial?

4. Did not the trial judge stir up public sentiment against the petitioner and all attorneys for the defense, and thus deprive the petitioner of his constitutional right to due process and the effective assistance of counsel, when the trial judge released to the press sensational transcripts of electronic eavesdropping conducted by the Government, causing an avalanche of unfavorable publicity which saturated the community during the trial?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth verbatim in Appendix G. The citations are as follows:

Fifth and Sixth Amendments to the Constitution of the United States;

18 U.S.C. sec. 2

18 U.S.C. secs. 891, 892, 894

STATEMENT OF THE CASE

This is a federal criminal case. The jurisdiction of the United States District Court is based on 18 U.S.C. sec. 3231.

The petitioner and Daniel Cecere were partners in an arbitrage operation with Gerald Martin Zelmanowitz, who was the Government's principal witness, Louis B. Saperstein, who died prior to the indictment, and Joseph Polverino, who was indicted with the petitioner but was granted a severance.

The Government built its prosecution on the testimony of Zelmanowitz, a man with a background of forgery, larceny, fraud and deception, and several criminal charges pending against him in the state and federal courts (458-558).

Zelmanowitz was a trader in arbitrage. He bought foreign securities overseas and sold them simultaneously in the United States. In late summer of 1967, Zelmanowitz entered into partnership with Saperstein. They opened a "numbered" Swiss bank account and they made their first trade by buying and selling 500 shares of Royal Dutch Petroleum (186-200, 319). Saperstein was enthusiastic about the arbitrage operation. He recognized that with additional funds they could trade in greater blocks of stock and earn more profits.

Saperstein took Zelmanowitz to meet the petitioner DeCarlo. They explained the mechanics of arbitrage to DeCarlo, and they asked DeCarlo for a loan of $100,000. DeCarlo referred them to Cecere (200-206).

Thereafter, Saperstein and Zelmanowitz met with Cecere and explained to him the mechanics of arbitrage. Saperstein asked for $100,000, but Cecere wished to

become a partner in the arbitrage instead of lending the money (262-266). A new partnership was set up. Cecere, DeCarlo, and Polverino would put $100,000 into it, in addition to a $50,000 loan which had previously been made to Saperstein. Saperstein would repay the loan and put the money into the partnership. The books would be wiped clean. The loan would no longer be outstanding and the interest would no longer be due. Thus the total investment would be $150,000. Saperstein and Zelmanowitz would receive 50% of the profits and the defendants Cecere, DeCarlo, and Polverino would receive 50% (266-267).

Between October 24, 1967 and January 1, 1968, the partnership earned about $85,000 in sixteen trading days (281). The arbitrage operation ended when certain required documentation was refused by the Internal Revenue Service (292-293).

Saperstein took $55,000 from the partnership which he embezzled for his own use. He thereafter withdrew an additional $40,000 with Zelmanowitz's permission, but without the knowledge of DeCarlo and Cecere (317, 347-348, 588-597).

The entire arbitrage operation occurred prior to May 29, 1968, the date of enactment of the law upon which the defendants were indicted, and prior to the dates alleged in the indictment, except that the Swiss bank account was not closed out until September, 1968 (371-373).

Zelmanowitz testified that on September 13, 1968, Saperstein was beaten by Cecere and Polverino in a room at the rear of a restaurant in New Jersey, but DeCarlo arrived, stopped the beating, rebuked Cecere and Polverino for administering the beating, and told

Saperstein to pay back the full amount that he owed within three months.

The prosecutor's proof of credit transactions is composed of hearsay admissions attributed to the defendants (286-287, 340-342, 352-353, 357-359, 368-370) and hearsay attributed to Saperstein to show his state of mind (299-300, 317, 342-343, 344-346, 346-349, 353-355, 1213, 1771-1775).

The petitioner and Daniel Cecere were convicted by a jury in the United States District Court for the District of New Jersey on three substantive counts and three conspiracy counts charging extortionate extensions of credit and the use of extortionate means to collect or attempt to collect the debts under 18 U.S.C. sec. 892, 894.

The petitioner and Cecere were each sentenced to a prison term of twelve years and a fine of $20,000, and they appealed. A three-judge panel of the Court of Appeals unanimously reversed the convictions and granted a new trial. (Appendix B). The reason for the reversal was that the introduction by the prosecutor of evidence as to the cause of Saperstein's death constituted incurably prejudicial error. The Government then petitioned for a rehearing with a suggestion for a rehearing *en banc*. The Court of Appeals ordered a rehearing *en banc*, and the Court *en banc* affirmed the judgment of conviction in an opinion in which six Circuit Judges concurred. Chief Judge Seitz filed a separate concurring opinion. Two dissenting opinions were filed by Circuit Judges Kalodner and Aldisert. (Appendix D).

The petitioner continues to be incarcerated in prison pending appeal.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT WITH REGARD TO THE SERVICE OF INTERROGATORIES UPON THE JURORS. IT IS ALSO SUFFICIENTLY IMPORTANT FOR THE SUPREME COURT TO REVIEW THE DECISION BELOW, BECAUSE THE TRIAL JUDGE, BY SERVING INTERROGATORIES UPON THE JURORS AND BY HIS INSTRUCTIONS AND COMMENTS WITH REGARD THERETO, HAS RAISED IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

The decision of the Court of Appeals for the First Circuit which is contra to the decision below is *United States* v. *Spock*, 416 F.2d 165 (1969).

The Hearsay Statement to the FBI

An important "witness" in this case is Louis B. Saperstein, a 63-year-old man who died on November 26, 1968 (388-390, 1013), prior to the indictment. He "testified" by way of a letter which he had written to the Federal Bureau of Investigation, part of which the trial judge admitted in evidence for the purpose of showing Saperstein's state of mind. The part of the letter which was read to the jury, however, went beyond Saperstein's state of mind and was an accusation against the petitioner. This letter was read to the jury over the strenuous objections of counsel for the petitioner (712-713, 1048-1066, 1071-1075, 1168-1193, 1209-1213, 1251-1255).

The Limitation on the Use of the Statement

The trial judge's charge to the jury with regard to Saperstein's statements, written and oral, was lengthy (1855-1861). To this charge, an exception was taken (1882-1884). These excerpts from the court's charge indicate the limitation the court attempted to

apply: "You may look to the statements of Mr. Saperstein as to his state of mind, * * *. * * * No act on the part of either of the defendants can be established from the contents of Mr. Saperstein's letter to the Federal Bureau of Investigation or from any of his other statements." But the trial judge's own recognition of the inferences which the jury could normally and logically draw from Saperstein's letter to the FBI shows its clearly prejudicial effect (1859-1860):

> "Now, I want to take as an example the letter written to the Federal Bureau of Investigation. There are statements of fact in that letter which you are not to consider as true either in whole or in part. You are not to consider them for any purpose whatsoever. There is a recital by Mr. Saperstein that he was beaten. That statement is not proof of the fact. If he was, you must look to other evidence, not to this letter. There is also a statement in this letter as to the conditions that were imposed for repayment of money. You are not to consider that as proof of his indebtedness or of the fact that repayment was demanded or the conditions thereof. There is also a statement in this letter that there was a phone call to Mr. DeCarlo with a reference to what Mr. DeCarlo's reaction was. There, too, you cannot consider those statements for the truth of them either in whole or in part. The letter was introduced solely for the purpose of permitting you to infer that Louis B. Saperstein was in a state of fear."

Did the trial judge's charge to the jury overcome the fact that in addition to his state of mind, Saperstein was permitted to "testify" against the petitioner with regard to the matters contained in the letter, without cross-examination?

The Jury Was Served With Interrogatories

Even the trial judge was not sure about the jury being able to follow his own charge. His Honor submitted interrogatories to each juror on this point. The procedure, instructions, and comments were highly coercive, and an exception was taken (1886-1887). As to the interrogatories, the trial judge gave this charge to the jury (1862-1864):

> ". . * * * Now, with respect to this matter of hearsay testimony, I am going to ask you to do something before you render your verdict. I have a statement, here, which is to be completed and to be the individual statement of each juror. It reads: 'We, each speaking individually,' and then there is a line and under that I have 'did' or 'did not' and you will write the appropriate word above that. 'consider in arriving at a verdict, as true in whole or in part, any facts related in any statement of Louis B. Saperstein made out of the presence of a defendant.'
>
> Further, 'We, each speaking individually', and then there is a line and under that I have 'did' or 'did not'—'consider such statements of Louis B. Saperstein only'—with the word 'only' underscored—'for the purpose of determination of his state of mind at the time he made the comments.'
>
> * * *
>
> "* * * I want your declaration to assure me that as far as the hearsay statements are concerned you will follow and observe the instructions of the court."

The court then decided to give each juror a separate sheet containing the interrogatories (1892, 1897-1898). Near the end of the court's entire charge to the jury,

His Honor referred back to the interrogatories as follows (1868-1869):

> "Now, ladies and gentlemen of the jury, briefly I am going to refer back to this one form that I have prepared for you to take into the jury room that you are to complete in order to inform me whether or not you permitted any statements of Louis B. Saperstein, including the letter and other statements made out of the presence of the defendants, to enter upon your deliberations with respect to the truth of the assertions. Now, I have twelve names here—I mean twelve lines, for signatures. If it occurs that there is a difference of opinion—I must repeat you are obligated by law to abide by my instructions, but if there is any juror that is hesitant to do so, then only those who subscribe to what is stated here can sign. I hope I don't encounter any such situation."

This is like saying to the jury, "I have asked you to do the impossible; I want you to sign a form which says that you have done the impossible; and I hope that you are not going to tell me you cannot do the impossible." It was unrealistic and coercive. The twelve jurors signed the twelve forms, which the judge received before receiving the verdict (1904). After the trial judge's above-quoted pressure upon the jurors, signing the forms proved nothing.

These twelve identical forms are attached to the verdict and are part of the record of the proceedings in the district court. (For easy reference, a photo copy of one of the twelve forms appears in Appendix A hereto).

There is no provision in the Federal Rules of Criminal Procedure which authorizes the submission to the jury of interrogatories to accompany the general ver-

dict. In *United States* v. *Spock*, supra, the United States Court of Appeals for the First Circuit reversed the conspiracy conviction of Dr. Spock and codefendants on the ground that the trial court, over defense objections, served interrogatories upon the jurors and elicited special verdicts from the jury. Said the court (pp. 181-183 of 416 F.2d):

> "In its exercise of its functions not only must the jury be free from direct control in its verdict, but it must be free from judicial pressure, both contemporaneously and subsequent.
>
> * * *
>
> "The constitutional guarantees of due process and trial by jury require that a criminal defendant be afforded the full protection of a jury unfettered, directly or indirectly.
>
> * * *
>
> "Nor is it an answer that these questions were labelled special findings and not special verdicts, and that the jury was informed that they were to be answered only if a general verdict of guilty had been reached."

As to the forms served upon the jurors in the case at bar, the trial judge entitled each one, "INTERROGATORY." He then referred to the interrogatories as "statements," but actually they were far worse than interrogatories or statements, because the trial judge made it quite clear, in his instructions and comments, exactly how His Honor expected the jurors to answer the interrogatories, for he said he did not want to "encounter any such situation" where some jurors might be unable to sign them in accordance with his instructions as to the limited use to be made of the Saperstein letter.

The interrogatories are mentioned briefly in the opinion of Judge Aldisert for the original three-judge panel below. The opinion merely states that the trial judge "required the jury to sign a special form" and then goes on to quote part of the "form." But the opinion of the Court *en banc* refers to the "form" as a "pledge." The opinion states: "The judge then requested each juror to sign a pledge that he would consider the letter only to determine Saperstein's state of mind because each side conceded that any consideration of the letter by the jury for the truth of its assertions would be improper."

The opinion of the Court of Appeals *en banc* below does not mention the title "INTERROGATORY" which the trial judge printed on each form in capital letters. The label is unimportant, however, as recognized in the *Spock* case, supra. What is important is that these interrogatories, whether labelled forms, or statements, or pledges, and the trial judge's instructions and comments with regard thereto, were judicial pressure put upon the jurors. The decision of the Court of Appeals for the Third Circuit *en banc* is, therefore, in conflict with the *Spock* case, supra, in the First Circuit.

The combination of the service of interrogatories upon the jurors and the trial court's instructions and comments with regard thereto was improper and coercive, and deprived the petitioner of due process and trial by jury.

A good discussion of verdicts in federal criminal cases appears in 8 Moore's Federal Practice, Par. 31.02 [3] (1972).

The petitioner respectfully submits that the conflict of the decision of the Court of Appeals for the Third

Circuit with the decision of the Court of Appeals for the First Circuit, as well as the importance of the right of the jurors to be let alone so that defendants will not be deprived of due process and a fair trial by an impartial jury, present important questions of constitutional law which should be settled by this Court. At the very least, we respectfully submit, the far departure of the trial judge from the accepted and usual course of judicial proceedings, which is sanctioned in the decision below, calls for an exercise of the Supreme Court's power of supervision. Serving the jurors with interrogatories and requiring the jurors to make a statement, pledge, or otherwise answer for their deliberations must not be allowed to become a matter of common practice in the United States District Courts.

2. THE DECISION BELOW IS SUFFICIENTLY IMPORTANT FOR THE SUPREME COURT TO REVIEW BECAUSE THE DELIBERATE MISCONDUCT OF THE PROSECUTOR, WHICH WAS ALLOWED BY THE TRIAL COURT AND SANCTIONED BY THE DECISION BELOW, HAS RAISED IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

This second reason was the basis for the unanimous decision of the original three-judge panel of the Court of Appeals to reverse the judgment of conviction. It is also comprised within the dissenting opinions of the Circuit Judges Aldisert and Kalodner after the rehearing *en banc*.

Near the end of his opening statement, the United States Attorney, after stating that Saperstein was threatened with death and beaten by the defendants added, "We cannot prove it, not corroborated through Louis Saperstein, because by November 26th he was dead." (164-165).

Counsel for the defendants moved for a mistrial because of the prosecutor's obvious inference that the defendants were responsible for Saperstein's death. The motion was denied (177-178).

The prosecutor knew that an investigation had been conducted into the death of Saperstein by the Essex County Grand Jury, and that the Grand Jury found no cause for action against anyone. Later in the trial, but not in the presence of the jury, the trial judge acknowledged that there was no evidence of murder (1059-1061), and ordered the production of the Essex County Grand Jury minutes for examination by all the attorneys (1232-1235, 1246-1247, 1250, 1273-1274, 1314-1319, 1340).

In order to avoid further discussion of this matter after the opening statement, the death of Saperstein was stipulated (388-390). But the prosecutor then proceeded to defeat the purpose of the stipulation. He used the witness Zelmanowitz to testify as to hearsay threats against Saperstein. (The record shows several oral hearsay statements attributed to Saperstein, which were admitted in evidence (317, 342-343, 344-346, 346-349, 353-355)). He then followed this up by introducing evidence that Saperstein died of acute arsenic poisoning. (This medical evidence was presented through the autopsy report (Government Exhibit G-34) and the testimony of the State Medical Examiner who performed an autopsy on the *exhumed* body of Saperstein (1028-1038, 1226-1227)). The inference left with the jury early in the case was thus further emphasized.

The unwarranted suggestion of murder weighed heavy at the trial, and the trial judge's charge to the

jury (1849-1850), to which an exception was taken (1889), did not relieve the situation.

The petitioner respectfully contends that the prosecutor's conduct should be placed in its proper light which, in the language of the unanimous opinion of the three-judge panel of the Court of Appeals, is simply this:

> "The evidence was designed to divert the jury from its duty to decide the criminal charges before it. The extortion trial was converted into a murder trial."

We are not dealing with an error which was caused by a prosecutor who inadvertently overstepped the lawful bounds. This is a case where the prosecutor carefully planned to prejudice the jury and deliberately carried out his plans. The overwhelmingly prejudicial conduct of the prosecutor is at the core of the issue. The aforementioned record fully supports Judge Aldisert's opinion and the petitioner's contention.

With the prosecutor's motive in mind, as well as the overwhelmingly prejudicial nature of the evidence as to the cause of Saperstein's death, we now turn to the applicable law.

Under our system of law, a defendant is entitled to a new trial, however guilty the court may believe him to be, if error affecting his substantial rights has occurred in any particular. As stated by the Supreme Court in *Bollenbach* v. *United States,* 326 U.S. 607 (1946):

> "it may not be amiss to remind that the question of guilt is not whether guilt be spelt out of a record, but whether guilt has been found by a jury according to the procedures and standards appropriate for criminal trials in the federal

courts. * * * From presuming too often all errors to be 'prejudicial', *the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty.* In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be." (Emphasis supplied.)

The *Bollenbach* case, supra, involved an equivocal direction to the jury on a basic issue. In the case at bar, the basic nature of the case was changed from a trial for extortionate credit transactions to a trial for murder. The holding in the *Bollenbach* case, supra, is therefore applicable here. The prosecutor's calculated behavior in creating this situation is inexcusable. By allowing the overwhelmingly prejudicial evidence to be admitted over defense objections, the trial judge committed incurable error.

It is difficult, if not impossible, to think of anything more unfair, or that would cause a jury to be more prejudiced against a defendant, than the unjustifiable thought that the defendant was connected with the suggested murder of a prospective witness. The Supreme Court's opinion in *Berger* v. *United States*, 295 U.S. 78 (1935), is particularly applicable here:

"The United States Attorney * * * while he may strike hard blows, he is not at liberty to strike foul ones.

* * *

"Moreover, we have not here a case where the misconduct of the prosecutor was slight or confined

to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential."

The cases on the conduct of counsel for the prosecution are collected in 23A C.J.S. Crim. Law sec. 1081.

The misconduct of the prosecutor, a quasi-judicial officer, in depriving the petitioner of his constitutional right to a fair trial by an impartial jury, was planned and deliberate and was so recognized in the original opinion of the three-judge panel of the court below. In view of the place of importance that a fair trial by an impartial jury has in our Bill of Rights, the decision of the Court of Appeals *en banc* is sufficiently important for the Supreme Court to review in order to settle this important question of constitutional law and as an exercise of its power of supervision, since the Court of Appeals *en banc* has sanctioned the prosecutor's misconduct in its decision.

3. THE DECISION BELOW IS EXCEPTIONALLY IMPORTANT FOR THE SUPREME COURT TO REVIEW, BECAUSE IT PROVIDES AN OPPORTUNITY FOR THE COURT TO SETTLE IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW WHICH CONCERN STANDARDS OF PROPER CONDUCT FOR TRIAL JUDGES AND PROSECUTORS.

Two years ago, the Supreme Court had occasion to consider proper criminal court proceedings with regard to the conduct of a defendant during trial. *Illinois* v. *Allen*, 397 U.S. 337, reh. den. 398 U.S. 915 (1970). The Supreme Court held that it is not error for a trial judge to remove a defendant from his own trial when the defendant's behavior is clearly of such an extreme nature as to justify his removal. The Supreme Court stated: "The flagrant disregard in the courtroom of

elementary standards of proper conduct should not and cannot be tolerated." We agree wholeheartedly with the holding and rationale of that decision.

We now most respectfully urge the Supreme Court to consider the other side of the coin. As pointed out by Mr. Justice Douglas in a concurring opinion in the *Allen* case, supra, in Anglo-American law, great injustices have at times been done by judges, as well as prosecutors.

In the case at bar, the trial judge pressured the jury as shown in the first reason for certiorari, and the prosecutor prejudiced the jury as shown in the second reason for certiorari. Having considered the conduct of a defendant in the *Allen* case, supra, the Supreme Court should consider proper court proceedings with regard to the conduct of the trial judge, the conduct of the prosecutor, and the right of the jury to be let alone, all of which bear upon the petitioner's constitutional right to due process and a fair trial by an impartial jury and upon the constitutional rights of all defendants in all federal criminal cases tried by a judge and jury.

The trial judge and the prosecutor have shown a flagrant disregard of elementary standards of conduct. However, the decision of the Court of Appeals below appears to treat the trial judge's service of interrogatories upon the jury as routine practice, and then, after a lengthy discussion in an attempt to overcome the two strong dissenting opinions, holds that the prosecutor's conduct in presenting proof of Saperstein's death was within the trial judge's discretion.

If, after considering the above reasons, the Supreme Court still has any doubt as to whether this would be an appropriate case for the consideration of proper standards of conduct for trial judges and prosecutors,

we assure the Court that there is much more. Questions concerning the conduct of the trial judge and the prosecutor permeate the entire trial record.

Personal Attacks Upon the Defense Attorneys During the Trial

In addition to the above, the trial judge and the prosecutor conducted personal attacks upon the defense attorneys during the trial, which deprived the petitioner of the effective assistance of counsel, for an attorney cannot devote his full talents in defense of his client when he has to defend himself at the same time. Moreover, a trial judge's hostility toward the defense attorneys can easily be sensed by a jury, to the detriment of the defense attorneys and their clients. As to the treatment of defense counsel by the trial judge and the prosecutor, we respectfully call the Court's attention to the following pages of the trial record: 710-711, 718-737, 901-902, 1459-1462, 1502, 1529-1540, 1540-1542, 1550-1561, 1621-1623. The trial judge was not impartial and his conduct toward the attorneys was humiliating. The prosecutor's conduct toward the attorneys was uncalled for, unprofessional, and slanderous. And there is still more.

The Trial Judge's Release of Transcripts of Electronic Eavesdropping Caused an Avalance of Publicity During the Trial.

Superimposed upon what happened to the petitioner and the attorneys in the courtroom are events which the trial judge caused to happen against the petitioner and the attorneys outside the courtroom. At the beginning of the trial, the trial judge released to the press sensational transcripts of illegal electronic eavesdropping conducted by the Government on alleged criminal conversations from 1961 to 1965, years be-

fore the activities for which the petitioner was indicted. The transcripts consist of more than 2000 pages of recorded conversations and FBI summaries of such conversations. Counsel for the petitioner objected to making the transcripts available to the public and forewarned the judge of the tremendous amount of publicity that could be expected, but the judge released the transcripts over counsel's objection. The anticipated avalanche of unfavorable publicity followed.

Conversations attributed to the petitioner DeCarlo were in the transcripts, and DeCarlo's name was repeated over and over again. The names of two attorneys for the defense were also in the transcripts of the conversations. Not only did the local newspapers, The Newark Evening News and The Newark Star-Ledger, carry front page stories and other stories *throughout* the trial (on the electronic eavesdropping as well as the trial itself), but The New York Times gave the transcripts of electronic eavesdropping unprecedented coverage. The prejudicial publicity saturated the community. (A summary of the prejudicial publicity contained in the three abovementioned newspapers *during the trial* appears in Appendix F hereto).

It is no answer to such judicial misconduct to argue that the jury was sequestered. Defense counsel do not have the burden of proving a clear nexus between community feeling and jury feeling. The Supreme Court cases are collected in *Pamplin* v. *Mason*, 364 F.2d 1 (5th Cir., 1966), and we cite the *Pamplin* case, supra, because the analysis in that opinion is applicable to the case at bar. As to the trial judge's release of the transcripts of electronic eavesdropping, we respectfully call the Court's attention to the following pages of

the trial record: 632-634, 448-457, 1075-1079, 244-245, 1150-1162, 1951-1957; Hearing on Motions, 6-8, 215-242.

A trial judge has the responsibility to make the courtroom a place of quiet dignity. He must not pressure the jury, and he must not conduct personal attacks upon the attorneys for the defense. Due process also demands that a trial judge shall refrain from stirring up public sentiment against an accused and his attorneys outside the courtroom. In the case at bar, the trial judge failed to fulfill his responsibilities.

A prosecutor, a quasi-judicial officer, has similar responsibilities. He must not deliberately divert the jury from its duty to decide the criminal charges before it and he must not, during the trial, conduct personal attacks upon the attorneys for the defense. In the case at bar, the prosecutor has also failed to fulfill his responsibilities.

For this third reason, therefore, the decision of the Court of Appeals *en banc* is exceptionally important for the Supreme Court to Review.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	Criminal No. 382-69
v.	:	
ANGELO DE CARLO and DANIEL CECERE	:	INTERROGATORY

FILED
JAN 28 1970
At 8:30 ..... M
ANGELO W. LOCASCIO
Clerk

I DID NOT consider in arriving at
did - did not

a verdict, as true in whole or in part, any facts related in any statement of Louis B. Saperstein made out of the presence of a defendant.

I DID consider such
did - did not

statements of Louis B. Saperstein only for the purpose of determination of his state of mind at the time he made the statements.

[signature]
Juror

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18,705 and 18,706

UNITED STATES OF AMERICA

v.

ANGELO DE CARLO,
DANIEL CECERE,
JOSEPH POLVERINO,
PETER LANDUSCO,

ANGELO DE CARLO, *Appellant in No. 18,705*
DANIEL CECERE, *Appellant in No. 18,706*

(D. C. Criminal No. 382-69)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued December 4, 1970

Before KALODNER, SEITZ and ALDISERT, *Circuit Judges*

Opinion of the Court

(Filed August 6, 1971)

ALDISERT, *Circuit Judge.*

These appeals from convictions under the federal statute prohibiting extortionate credit transactions, 18 U.S.C. §§ 892, 894,[1] challenge the constitutionality and

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[1] These sections provide:

§ 892. *Making extortionate extensions of credit*

(a) Whoever makes any extortionate extensions of credit, or conspires to do so, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, if it is shown that all of the following factors were present in connection with the

applicability of the statute and present several evidentiary questions. The constitutional attacks have been recently rejected by the United States Supreme Court, *Perez* v. *United States*, 402 U.S. 146, 9 Cr.L. 3091 (Sup. Ct., April 26, 1971), and thus need not be considered here.

---

extension of credit in question, there is prima facie evidence that the extension of credit was extortionate, but this subsection is nonexclusive and in no way limits the effect or applicability of subsection (a):

> (1) The repayment of the extension of credit, or the performance of any promise given in consideration thereof, would be unenforceable, through civil judicial processes against the debtor . . . at the time the extension of credit was made.
>
> (2) The extension of credit was made at a rate of interest in excess of an annual rate of 45 per centum calculated according to the actuarial method of allocating payments made on a debt between principal and interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal.
>
> (3) At the time the extension of credit was made, the debtor reasonably believed that either
>
> > (A) one or more extensions of credit by the creditor had been collected or attempted to be collected by extortionate means, or the nonrepayment thereof had been punished by extortionate means; or
> >
> > (B) the creditor had a reputation for the use of extortionate means to collect extensions of credit or to punish the nonrepayment thereof.
>
> (4) Upon the making of the extension of credit, the total of the extensions of credit by the creditor to the debtor then outstanding, including any unpaid interest or similar charges, exceeded $100.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence of any of the circumstances described in subsection (b)(1) or (b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing the understanding of the debtor and the creditor at the time the extension of credit was made, the court may in its discretion allow

Appellants were indicted and convicted by a jury on three substantive and three conspiracy counts charging extortionate extensions of credit and the use of extortionate means to collect or attempt to collect the debts. The credit transactions involved, in part, business relations among appellants, one Zelmanowitz, who appeared as the government's principal witness, and Louis Saperstein, who died prior to the indictment.

---

evidence to be introduced tending to show the reputation as to collection practices of the creditor in a community of which the debtor was a member at the time of the extension.

§ 894. *Collection of extensions of credit by extortionate means*

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances described in section 892(b)(1) or the circumstances described in section 892 (b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

Zelmanowitz had been engaged in arbitrage—simultaneous foreign purchase and domestic sale of securities—and induced Saperstein to join him. They agreed that Saperstein would invest $50,000, that bank accounts would be opened in Switzerland, and that profits would be divided. After the enterprise commenced operations, they approached appellant De Carlo for a loan of $100,000. De Carlo referred them to appellant Cecere, who, although declining to lend the money, offered to invest the sum in the enterprise in behalf of himself, De Carlo, and one Polverino. As part of their offer, a prior loan of $50,000 from them to Saperstein would be cancelled and converted into a total investment of $150,000. After cancellation of this debt, Saperstein remained indebted to appellants and others for prior and additional loans totaling $200,000. The offer was accepted and the venture proceeded with De Carlo, Cecere and Polverino entitled to 50 percent of the profits.

The arbitrage trading continued from November through December, 1967, when it was halted by the Internal Revenue Service which refused to issue tax equalization forms to Zelmanowitz. Because Saperstein was required to make principal and interest payments on his $200,000 indebtedness, he persuaded Zelmanowitz to allow him to withdraw $40,000 from the arbitrage account. This withdrawal was made on January 15, 1968, without the knowledge or consent of appellants. Later Saperstein told Zelmanowitz that he had not deposited all of the moneys advanced by appellants. in the arbitrage account in Switzerland because he needed funds to repay his other loans from them. Saperstein then disappeared. He was located in New York in September, 1968, and was persuaded by Cecere to return to New Jersey where De Carlo joined them. Saperstein was kicked, punched, and badly beaten by Cecere and an associate. De Carlo then told him that he was required to make weekly payments of $5,000 and that if all the money were not paid by December 13, 1968, Saperstein would be dead. Saperstein died on November 26 of acute arsenic poisoning.

The day before Saperstein's death he prepared a letter, the following portions of which were admitted into evidence with cautionary instructions.

> Federal Bureau of Investigation, Newark, New Jersey.
>
> Gentlemen: I am writing you, maybe others can be helped by my plight. On September 13, 1968 I was severely beaten at a place in the rear of Weiland's Restaurant, Route 22, DeCarlo's headquarters. I was then told and given 3 months until December 13, 1968 to pay the entire accumulated amount under threat of death. Cecere, DeCarlo and Polverino, also stated many times my wife and son would be maimed or killed. Please protect my family—I am sure they mean to carry out this threat.
>
> Last night from my home I called DeCarlo and pleaded for time but to no avail. Over the phone De Carlo stated unless further monies was paid the threats would be carried out.
>
> LOUIS B. SAPERSTEIN

Appellants argue that the trial court committed reversible error in admitting these statements.

At the time this and other information was offered, the government stated to the court that it was "for the limited purpose of showing the state of mind of . . . Saperstein, during the period of conspiracy charged." Counsel for appellants objected on the basis that the statements were hearsay, going to proof of the facts asserted, and unreliable. The Assistant United States Attorney then said: "[T]he United States is willing to stipulate that this declarant's statements cannot be used for the truth of the matter stated, that the defense is entitled to such an instruction to the jury." Thereafter, the court told counsel that, in its view, as "much of the letters as would disclose a state of mind [would] be admissible." Judge Shaw de-

layed a ruling on the issue, however, for he was "confronted with the problem of how far it is humanly possible to give effective instructions to the jury that they consider [the statements] only for one particular purpose. . . ." Ultimately, the court decided to admit these portions of Saperstein's letter on the ground that they reflected his state of mind. Again appellants' counsel insisted that the information should be excluded as hearsay. And again the government argued that "[i]t doesn't come in for the truth of the contents stated."

In their requests for charge, counsel for appellants made no mention of the Saperstein letter. Nevertheless, the court, in its instructions to the jury, commented extensively on the purpose for which the statements were admitted. For example, Judge Shaw cautioned:

> The sole purpose for which you can consider this evidence is for such inference as you may draw from it as to what the understanding of Louis B. Saperstein may have been with respect to what could happen to him if he failed to make repayment of a claim by defendants. You are not to consider this letter as proof of the facts related therein.

In addition, he required the jury to sign a special form which recited:

> Further, "We, each speaking individually," and then there is a line and under that I have "did" or "did not"—"consider such statements of Louis B. Saperstein only"—with the word "only" underscored —"for the purpose of determination of this state of mind at the time he made the statements."

In arguing objections to the charge, only Mr. Direnzo, counsel for appellant De Carlo, referred to the court's cautionary instructions:

> Again I object to that portion of your Honor's charge with reference to the Saperstein letter, with

> reference to the understanding of Louis Saperstein. You said its sole purpose was his understanding of what could happen to him if he did not comply, and the aprehension that he had and the fear that he possessed. Again I object to that portion of it. . . . [*T*]*he purpose of the letter rather than establishing his state of mind is being used to establish proof of facts contained in that letter, and I submit that that was improper, and I except to that portion of your Honor's charge for that purpose.*

(Emphasis supplied.)

Now, on appeal, appellants argue for the first time, not that the letter was hearsay, but it was inadmissible even to show state of mind. It was irrelevant, they contend, because it referred to Saperstein's mental state at the time of the writing and not at the time the credit was extended. It is true that section 891(6) of Title 18 defines an extortionate extension of credit as

> [a]ny extension of credit with respect to which it is the understanding of the creditor and the debtor *at the time it is made* that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to coerce harm to the person, reputation, or property of any person.

(Emphasis supplied.)

Moreover, while mentioning this definition, the district court's instructions did not charge that the statements were relevant as circumstantial evidence to show Saperstein's state of mind *only* at the time the credit was extended. Indeed, the special form signed by the jurors referred to "his state of mind at the time he made the statements."

We will not hold, however, that the admission of the letter, or the court's instruction thereon, constitute reversible error. First, appellants did not present to the trial judge the precise contention they press here. Second, even assuming, without deciding, that the statements would not

qualify as circumstantial evidence of Saperstein's state of mind at the time the credit was extended, and assuming further that the court's instructions effectively precluded their consideration for that purpose, we have no doubt that the victim's mental apprehension at the time he wrote the letter was relevant.

Section 892(b)(3), dealing with extortionate extension of credit, and § 891(6), defining the term, refer to the understanding of the debtor at the time the loan is made. Section 894, however, imposes no such limitation on the state of mind inquiry. Subsection (b) provides:

> In any prosecution under this section, *for the purpose of showing an implicit threat as a means of collection*, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, *to the knowledge of the person against whom the implicit threat was alleged to have been made*, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(Emphasis supplied.)

It is clear, therefore, that the victim's mental apprehension regarding collection of the debt is relevant. The admitted portions of the Saperstein letter can be viewed as bearing directly on this issue.[2] As the government has argued, "The

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[2] Although § 894(b) prescribes a specific method of "showing an implicit threat as a means of collection," we cannot ascribe to Congress the intent to limit such a showing to that method. Surely Congress did not intend to exclude accepted methods of proof. Compare § 892(b):

> In any prosecution under this section, if it is shown that all of the following factors were present in connection with the extension of credit in question, there is prima facie evidence that the extension of credit was extortionate, but this subsection is *nonexclusive* and in no way limits the effect or applicability of subsection (a).

(Emphasis supplied.)

statements of Saperstein contained in the portions of the letter put into evidence convey his present fears for the future safety not only of himself but of his family."[3]

We find that the district court's instructions properly charged the state of mind exception to the hearsay rule and provided the jury with sufficient guidance in making the critical distinction with respect to the purpose for which Saperstein's letter was introduced.

Appellants next argue that the credit transactions did not come within the purview of the statute because the funds were not a loan to Saperstein but a capital investment in a commercial enterprise. There is no merit to this contention. At the least, the evidence established a creditor-debtor relationship involving some $200,000, extending from appellants and their associates to Saperstein, over and above the $150,000 earmarked for the arbitrage investment.

The circumstances of Saperstein's death form the backdrop of the serious evidentiary question to which we now advert. Although it was stipulated that he died prior to trial, information that his cause of death was arsenic poisoning was presented to the jury on two occasions. In the first instance, the government called the state medical examiner who had performed an autopsy on Saperstein and who, over objections, testified as to the cause of death. The government's most plausible justification for this testimony was that it was needed to rebut inferences raised by defense cross-examination of Mrs. Saperstein that Mr. Saperstein died of natural causes resulting from excessive hard drink-

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[3] Indeed, it seems to us that an extortion victim's state of mind is always relevant, and, in fact, an essential element of the crime charged, which is provable as an exception to the hearsay rule. An analogy may be drawn to the Hobbs Act, 18 U.S.C. § 1951 which defines extortion as "the obtaining of property from another with his consent induced by the wrongful use of actual . . . *fear*." (Emphasis supplied.)

ing or eating. The following questions had been asked and responses elicited on cross:

Q Were you [at the restaurant] for several hours?
A Yes
Q And while you were there Mr. Saperstein ordered food, did he not?
A He did.
Q And he ordered some beverages?
A Yes, he was drinking.
Q What was he drinking, please?
A I don't know.
Q Well, can we say that he was drinking hard liquor?
A I think so.
Q As a matter of fact, he drank quite a bit, did he not?
A He did have a number of drinks; I don't know just how much.
Q Would it be a fair statement to say that he was quite inebriated?
A Yes, he was.

• • •

Q Incidentally, did he drive you to the Westwood [restaurant]?
A Yes, he did.
Q Did he drive you back?
A No
Q Someone else drove?
A Someone else drove us back.
Q Was that because he had a little bit too muuh to drink?
A Yes.

The government contends that because this examination raised the inference that Saperstein died of natural causes due to excessive drinking, it was therefore entitled to rebut this false inference by adducing evidence through the medical examiner that Saperstein died of acute arsenic poisoning. We believe it strains logic to the breaking point to say that this cross examination raised an inference as to the cause

of Saperstein's death. The reality here is that the government's use of the medical examiner's testimony, particularly in combination with the admission of portions of Saperstein's letter to the FBI could conceivably have led the jury to conclude that the appellants had murdered Saperstein.

How then is the admission of such highly prejudicial evidence to be justified in a trial charging extortionate extension of credit? The government points to the fact that in the presentation of their defense the appellants produced testimony that shortly before his death Saperstein expressed the belief that he had cancer.[4] Allegedly to rebut this inference the government later produced the autopsy report showing the cause of death to be acute arsenic poisoning. An objection was made but overruled, the court stating: "In the light of testimony this witness has given, your objection is overruled."

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[4] Witness Ostrow testified to a conversation he had with Saperstein four days before the death:

Q I direct your attention to the evening of November 22, 1968, which was the Friday before Mr. Saperstein passed away on the following Tuesday, and I ask you if you recollect having a conversation with Mr. Saperstein on that evening with respect to his having seen a doctor.

A I do, sir.

Q Would you tell us what he said to you and what you said to him?

A Yes. My door was open. I was working late, about 7:00 p.m. Mr. Saperstein walked by attired in a camel hair coat. I waved greeting—excuse me—I waved a greeting and said, "Hi, Louis. What are you doing here so late?"
He replied, "I had to come back to the office. I have had a fatiguing day at the doctor." I motioned him in. He came in and sat down, and I said, "What brought you to the doctor?" He said, "Well—he wouldn't tell me. I think he was trying to hide from me the fact that I have cancer." I said, "Why are you guessing? Why don't you find out?" He said, "Well, he suggested that I go to the Lahey Clinic in Boston."

The vice in the government's argument lies in its failure to consider the timing of the cancer testimony. The district court had admitted over objection as part of the government's case the medical examiner's testimony that Saperstein died of acute arsenic poisoning. At this point the admission of such testimony constituted reversible error. Yet, the defense could not be sure that its objection would be sustained on appeal. It therefore tried to overcome the effect of the admission of the government's highly prejudicial evidence as to cause of death by introducing the testimony concerning cancer. The government suggests that appellants lost the benefits of their earlier objection because they took such later action. We disagree.

After the trial court erroneously admitted the highly prejudicial evidence over proper objection, the defense had every right to attempt to mollify the effect of the government's evidence and inquire further into the issue, albeit irrelevant, opened by the government. This is could do without waiving its previous objection.

It has long been the rule that when a party's objection is made and overruled, he is entitled to treat that ruling as the "law of the case" and to explain or rebut, if he can, the evidence which has come in over his protest. Consequently, a party does not waive his objection if he meets the evidence to which he objected with other evidence which under the theory of the objection would be incompetent. *United States* v. *Modern Reed*, 159 F.2d 656 (2nd Cir. 1947), *cert. denied* 331 U.S. 831 (1947); *Salt Lake City* v. *Smith*, 104 F. 457, 470-71 (8th Cir. 1900); McCormick, Law of Evidence § 55, at 129-130 (1954); 1 Wigmore, Evidence, § 18 at n.36 & 36a (3d Ed. 1970 Supp.); cf. *Trouser Corp. of America* v. *Goodman & Theise, Inc.*, 153 F. 2d 284, at n.6 (3d Cir. 1946). That rule is applicable here.

We are also satisfied that the admission of the government's evidence was so prejudicial that it could not be cured by any instruction.[5]

The government argues alternatively that the evidence of cause of death was relevant even if the defense did not open the door to the use of such evidence. The alleged relevancy, it says, is that the death by poisoning "may reasonably be inferred to be related, either directly or indirectly,

[5] Defense counsel requested the court to instruct the jury:

> I charge you that Louis Saperstein died from causes not attributable to these defendants. Therefore, you are not to think about or speculate as to the circumstances of the ingestion of poison and it should play no part in your discussions, deliberations, or decision.

Judge Shaw informed counsel that he would not charge the first sentence "because there is no evidence from which it could be determined that the death was either suicide or homicide." He did agree, however, to charge that "they are not to speculate on that subject"—the substance of the second sentence in the proposed instruction. A brief colloquy ensued:

> Mr. QUERQUES:
>
> If your Honor pleases, I think if you leave out the first sentence and you put in the second, you are creating a great disadvantage for us. It is not us who introduced this evidence, it was the prosecution. And it was introduced, as we indicated when it was introduced, in a very unfair way. And we made an objection to it. We said then, and we say now, that it was not an issue in the case, had no place in the case. Once your Honor admitted it, I think the charge as we have given it to you now is one which is fair. To take out the first sentence and put in only the other is to really ask the jury to disregard the evidence that you admitted.
>
> THE COURT:
>
> The evidence was—from Dr. Albano and from the other doctors—that the manner in which he—or the cause of ingestion of the arsenic was unknown. There is no positive evidence one way or the other. But if you do not care to have the substance of the second sentence charged, I will omit it.

to such extortionate conduct." Thus, it suggests that it may show that Saperstein committed suicide out of fear created by the defendants. Alternatively, it is contended that it tended to show that appellants actually carried out their threat to kill Saperstein.

The short answer is that there was no evidence connecting appellants with Saperstein's death. Thus it was not relevant to the charges. Even if it were remotely relevant, its use was so prejudicial as to render it inadmissable. The evidence was designed to divert the jury from its duty to decide the criminal charges before it. The extortion trial was converted into a murder trial.

The words of Chief Judge Murrah in *Sumrall* v. *United States*, 360 F.2d 311, 314 (10th Cir. 1966), seem particularly fitting here:

> We are, of course, loathe to reverse a case like this in the face of overwhelming evidence of guilt. Technical niceties such as these make the law appear ridiculous to the man on the street. But, "all law is technical if viewed only from concern for punishing crime without heeding the mode by which it is accomplished. . . ." In circumstances like these the question is not whether the appellants have been proven guilty, but whether guilt has been established according to the procedural safeguards to insure trial before a fair and unprejudiced jury.

Since the introduction by the government of the evidence as to cause of death constituted incurably prejudicial error, the judgments of conviction of the district court will be reversed and the cause remanded for a new trial.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18,705 and 18,706

UNITED STATES OF AMERICA

vs.

ANGELO DE CARLO,
DANIEL CECERE,
JOSEPH POLVERINO,
PETER LANDUSCO,

ANGELO DE CARLO, *Appellant in No. 18,705*
DANIEL CECERE, *Appellant in No. 18,706*

(D.C. Criminal No. 382-69)

Present: SEITZ, *Chief Judge*, and KALODNER, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, and ROSENN, *Circuit Judges*.

Upon consideration of appellee's petition for rehearing in the above-mentioned cases,

It is ORDERED that appellee's petition for rehearing be and hereby is granted; and

It is Further ORDERED that the judgment of this Court filed August 6, 1971, be and hereby is vacated; and

It is Further ORDERED that the Clerk of this Court list these cases for rehearing before the Court en banc at the convenience of the Court.

By the Court,
FRANCIS L. VAN DUSEN,
Circuit Judge

Date: October 14, 1971

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD DISTRICT

Nos. 18,705 and 18,706

UNITED STATES OF AMERICA

v.

ANGELO DECARLO
DANIEL CECERE
JOSEPH POLVETINO
PETER LANDUSCO

ANGELO DECARLO
Appellant in 18,705

DANIEL CECERE
Appellant in 18,706

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued December 4, 1970
Reargued January 12, 1972
(en banc)

Before SEITZ, *Chief Judge*, KALODNER, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, ROSEN, HUNTER, *Circuit Judges*

Opinion of the Court

(Filed April 4, 1972)

ADAMS, *Circuit Judge*

Following a three week jury trial, Angelo DeCarlo and Daniel Cecere[1] were convicted of violations of 18 U.S.C.

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[1] The trials of Joseph Polverino and Peter Landusco were severed because of their illnesses. They, therefore are not parties to this appeal.

§§ 892, 894, prohibiting extortionate credit transactions, and they appealed. The original argument of the appeals was on December 4, 1970 and the opinion of the panel was handed down on August 5, 1971. As a result of a petition for rehearing, arguments were submitted to the Court en banc.

The points raised present vexing questions whether certain testimony, admitted into evidence as part of the government's case, should have been excluded and whether even if it were otherwise admissible it was so prejudicial that these defendants should be given a new trial. The issues are vexing not because this record permits any doubt regarding the proclivities of these defendants, but because of our abiding concern that every individual be afforded a fair trial before being convicted.

1. Factual Background

The Government's chief witness against DeCarlo and Cecere was Gerald Zelmanowitz, a securities analyst who also engaged in arbitrage.[2] Price differentiations between foreign and domestic markets are so small that Zelmanowitz required large sums of money in order to make his arbitrage operation profitable. He spoke to Louis Saperstein and convinced him to deposit $50,000 in a Swiss Bank to be used for the arbitrage accounts, with profits to be divided equally. In search of more funds for the account, Saperstein and Zelmanowitz then approached DeCarlo and asked him to lend them $100,000. DeCarlo referred them to Cecere for the funds, but Cecere turned down their request for a loan. Cecere desired instead to invest that amount of money on behalf of DeCarlo, Polverino and himself in return for 50% of the profits. As a further element of the bargain, the three

[2] Arbitrage, as practiced by Zelmanowitz, consisted of buying securities in a foreign market and simultaneously selling them in the United States. Because of fluctuating currency exchange rates and numerous other factors, stock in the same company often trades at different prices in different markets. With sufficient funds, a substantial profit can be made in this manner.

agreed to cancel a loan of $50,000 which they had previously made to Saperstein and thus increase their investment in the arbitrage operation to $150,000. From Saperstein's point of view, this arrangement reduced his outstanding loans from these men to $200,000.

In its initial period, the partnership was a financial success, netting a profit of $85,000 in its first sixteen trading days. The Internal Revenue Service, in December, 1967, however, refused to issue the necessary tax equalization forms to Zelmanowitz, thereby bringing the business to a standstill. Saperstein's serious difficulties with DeCarlo and Cecere began to develop at this point. "Vigorish" payments —the term used by the parties to mean interest—on the $200,000 of outstanding debt were extremely large judging from the $800 per week interest Saperstein owed on the $50,000 debt which had been cancelled. In desperate need of funds, Saperstein told Zelmanowitz that he was in fear of bodily harm because he owed these men a considerable amount of money and convinced Zelmanowitz to permit him to withdraw $40,000 from the arbitrage account in order that he might be current with his payments to DeCarlo and Cecere. In July, 1968, Saperstein again fell behind in his payments and received a loan of $5,000 from Zelmanowitz. Later in the month, Saperstein attempted to borrow an additional $80,000 from Zelmanowitz, and after being refused, asked for $5,000 to meet the "vigorish" payment. In a state of despair, Saperstein then left.

In September, 1968 presumably because of his inability to pay his debts, Saperstein disappeared. Cecere called Zelmanowitz in an attempt to locate Saperstein, telling Zelmanowitz that DeCarlo, Polverino, Landusco, and Cecere merely wanted to sit down with Saperstein to work out a schedule of payments. Zelmanowitz arranged to meet with Saperstein on September 13, 1968 in the Americana Hotel in New York. A meeting was arranged for later in the day between Saperstein, Cecere and a Cecere aide called Lenny. At the second meeting, Saperstein pleaded with Cecere not to harm

him, and even went so far as to offer to take out a life insurance policy for $100,000 naming Cecere as the beneficiary and to commit suicide by jumping out a window in return for Cecere's not harming his family. Saperstein was then taken by Cecere and Lenny to a place owned by DeCarlo behind Weiland's Restaurant in Mountainside, New Jersey, and Zelmanowitz was told to meet them there. Zelmanowitz testified that on entering the house:

> "There was a group of people in the first room as I entered, and I heard my name called, and there is another room attached to this room which I entered, and when I got in there Mr. Saperstein was laying on the floor. He was purple. He was bloody. His tongue was hanging out of his mouth * * * I thought he was dead * * *."

He further testified that Polverino and Cecere were kicking and punching Saperstein when he arrived. DeCarlo then entered the room at which time Cecere said to him, "This s.o.b. stole our money. I am going to kill him." DeCarlo told Cecere and Polverino to stop the beating and get outside. DeCarlo, Cecere, Polverino, Zelmanowitz and Saperstein entered a station wagon parked outside and discussed the money owed by Saperstein. After Saperstein told DeCarlo that he had no money at all, DeCarlo told him to pay $5,000 every Thursday and the entire $200,000 by December 13, 1968 or Saperstein "would be dead". Saperstein explained that he had been paying only $3,500 per week in "vigorish" and that the maximum he could afford to pay now was $3,000. DeCarlo's reply was, "Forget about it. Bring five or you're dead." Testimony indicated that from September 13, 1968, the date of the beating, until his death from acute arsenic poisoning on November 26, 1968, Saperstein was frequently very depressed.

At some time prior to his death, Saperstein wrote a letter to the Federal Bureau of Investigation that was mailed on November 25, 1968, the day before he died. The following

portions of the letter were admitted into evidence with a cautionary instruction.[3]

"Federal Bureau of Investigation, Newark, New Jersey.

"Gentlemen: I am writing you, maybe others can be helped by my plight. On September 13, 1968, I was severely beaten at a place in the rear of Weiland's Restaurant, Route 22, DeCarlo's headquarters. I was then told and given 3 months until December 13, 1968 to pay the entire accumulated amount under threat of death. Cecere, DeCarlo and Polverino, also stated many times my wife and son would be maimed or killed. Please protect my family—I am sure they mean to carry out this threat.

"Last night from my home I called DeCarlo and pleaded for time but to no avail. Over the phone DeCarlo stated unless further monies was paid the threats would be carried out.

LOUIS B. SAPERSTEIN"

2. Defendants' Major Contentions

DeCarlo and Cecere advance three major contentions: (1) the statute under which they were indicted is unconstitutional; (2) the district court committed reversible error when it admitted into evidence the letter from Saperstein to the F.B.I., and (3) the admission into evidence of the cause of Saperstein's death was so prejudicial that defendants should be granted new trials.

A. Constitutionality of the Act

The first argument, that the statute is unconstitutional, was laid to rest in the past term of the Supreme Court. In Perez v. United States, 402 U.S. 146 (1971), the Supreme Court rejected the contentions advanced here and upheld

[3] Each member of the jury was also requested to sign a form which stated that the juror had considered the contents of the letter only for the purpose of determining Saperstein's state of mind.

the validity of 18 U.S.C. §§ 892, 894. Further consideration is, thus, unnecessary.

B. The Saperstein Letter

The second point, concerning the admissibility of the Saperstein letter, raises questions of interpretation of the Act and of the scope of the so-called state-of-mind exception to the hearsay rule. In the district court, both the Government, in offering the letter, and the court, in ruling that certain portions of it were admissible, made clear that the contents of the letter would be used solely to show Saperstein's state of mind during the period of the alleged conspiracy. DeCarlo and Cecere objected to the admission of the letter on the grounds, *inter alia*, that it was not a proper dying declaration, that the letter was prejudicial, and that they were denied their Sixth Amendment right to confront the witnesses against them. Here, they raise for the first time the additional contention that the letter was irrelevant for the purpose of proving a crime based on the statutory provisions under which DeCarlo and Cecere were indicted.[4]

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[4] The revelant portions of the 18 U.S.C. read as follows:

"§891. For the purposes of this chapter:

(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person."

§ 892. *Making extortionate extensions of credit*

(a) Whoever makes any extortionate extensions of credit, or conspires to do so, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, if it is shown that all of the following factors were present in connection with the extension of credit in question, there is prima facie evidence that the extension of credit was extortionate, but this subsection is

Hearsay is traditionally defined as an unsworn, out-of-court statement offered in court for the truth of the matter stated. *See e.g.*, 5 J. Wigmore, *Evidence* § 1361 (3d Ed. 1940). Testimony relating to the state of mind of the out-of-court declarant, on the other hand, is generally not

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nonexclusive an din no way limits the effect or applicability of subsection (a):

(1) The repayment of the extension of credit, or the performance of any promise given in consideration thereof, would be unenforceable, through civil judicial processes against the debtor . . . at the time the extension of credit was made.

(2) The extension of credit was made at a rate of interest in excess of an annual rate of 45 per centum calculated according to the actuarial method of allocating payments made on a debt between principal and interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal.

(3) At the time the extension of credit was made, the debtor reasonably believed that either

(A) one or more extensions of credit by the creditor had been collected or attempted to be collected by extortionate means, or the nonrepayment thereof had been punished by extortionate means; or

(B) the creditor had a reputation for the use of extortionate means to collect extensions of credit or to punish the nonrepayment thereof.

(4) Upon the making of the extension of credit, the total of the extensions of credit by the creditor to the debtor then outstanding, including any unpaid interest or similar charges, exceeded $100.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence of any of the circumstances described in subsection (b)(1) or (b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing the understanding of the debtor and the creditor at the time the extension of credit was made, the court may in its discretion allow evidence to be introduced tending to show the reputation as to collection practices of the creditor in a com-

hearsay because, although the declaration is unsworn and given out of court, it is not offered for the truth of the matter stated. Doubtless, a number of out-of-court statements could have value both for the truth of the matter they contain and for the state of mind of the declarant. The Saperstein letter is such a statement.

Had the letter been admitted for the truth of its assertions, it would have tended to show that Saperstein was

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munity of which the debtor was a member at the time of the extension.

§ 894. *Collection of extensions of credit by extortionate means*

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances described in section 892(1) or the circumstances described in section 892(b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection of attempt at collection.

beaten on September 13th and in fact owed DeCarlo and Cecere a sum of money. It would have fallen then within the definition of hearsay, and would not have been admissible unless it came within one of the recognized exceptions to the hearsay rule. However, it was not offered for the truth of the matter stated.

When the letter was proffered, the United States Attorney began his argument by stating, "These documents are offered for the limited purpose of showing the state of mind of the victim in this case, Louis B. Saperstein * * * [I]t is our position that * * * the explanations, whether they be written or oral, of the victim of an extortion are admissible for the limited purpose of proving his state of mind, what fears were operating his mind." When ruling that certain portions of the letter were admissible, the district court stated, "I have also reached the opinion as to that portion of the letters which reflect state of mind, that there is an exception to the hearsay rule generally recognized, and I intend to admit in evidence that portion, deleting the material as to the amount owed him and the interest charge."

Our inquiry on this point is not ended by the determination that the letter could have shown Saperstein's state of mind, and that it was admitted solely for that purpose.[5] Certain evidence may be capable of inflaming the passions of the jury to the point that when the probative value of the evidence is weighed against the potential

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[5] Defendants' Sixth Amendment argument may be disposed of at this point. Pointer v. Texas, 380 U.S. 400 (1965), established the rule that in certain situations, evidence admissible as an exception to the hearsay rule should be excluded because if it were admitted, the defendant would be denied his right to confront the witness against him. Rather than proving the truth of the matters asserted, the letter was admitted to prove Saperstein's state of mind. The Sapperstein letter, thus, was not hearsay in the context of its admission, and, the Sixth Amendment was in no way infringed.

prejudice, it should be excluded notwithstanding it would otherwise be admissible.

Undue prejudice to the defendants from the admission of the Saperstein letter could arise only if the jury considered the statements contained therein for the truth of their assertions rather than for their value as showing Saperstein's state of mind. Similarly, the probative value properly accrues when the jury considers the letters only with regard to the state of mind of the writer. The defendants contend that asking the jury to separate the concepts of state of mind and truth of the assertions is similar to requiring them to answer the classic query: "How many angels can dance on the head of a needle?"[6] For this proposition they rely on Shepard v. United States, 290 U.S. 96 (1933), and in particular on the statement by Justice Cardoza, "When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out." *Id.* at 104.

The facts and holding of *Shepard*, however, belie the applicability of this sentence in the context of the present case. There, the defendant was accused of murdering his wife by poison. The Government, in its rebuttal, proved a conversation between the deceased wife and her nurse during which the wife said, "Dr. Shepard has poisoned me." *Id.* at 98. The Government contended in the district court that the conversation was admissible as a dying declaration, and that it should come in for the truth of the matter asserted. The district court admitted the evidence over objection and sent it to the jury on this basis. During argument before the court of appeals and the Supreme Court, the Government altered its theory and contended the statement was admissible to show the wife's state of mind in order to rebut an inference raised by the defense that she had contemplated suicide. Reversing Dr. Shep-

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[6] Quodlibet ascribed to various medieval theologians, c. 1400." *A New Dictionary of Quotations* 41 (H. Meneken, Ed. 1946).

ard's conviction, Justice Cardoza reasoned first that the statement was not admissible as a dying declaration because the necessary elements for a dying declaration had not been shown by the Government and second that hindsight would not suffice to make the statement admissible to show state of mind because, "The defendant would have no grievance if the testimony in rebuttal had been narrowed to that point." *Id.* at 104.

In the present case, the record is clear that the Government had no theory other than state of mind for the admissibility of the Saperstein letter, and the Court accepted the proffer on no other basis. In the charge, the jury was instructed, "You may consider [the letter] only for the purpose of deciding whether on the part of Mr. Saperstein there was a state of apprehension and fear of harm." The judge then requested each juror to sign a pledge that he would consider the letter only to determine Saperstein's state of mind because each side conceded that any consideration of the letter by the jury for the truth of its assertions would be improper. Thus we are not confronted with a *Shepard*-type, *post hoc* rationale for the admission of evidence. Rather, the letter was admitted for a narrow purpose, the trial court properly instructed the jury concerning their use of the contents of the letter, and the jury was capable of drawing the required distinction in order that the defendants would not be unduly prejudiced.

As noted above, the defendants have raised for the first time on appeal the contention that Saperstein's state of mind at the time he wrote the letter was not relevant within the meaning of 18 U.S.C. §§ 891 *et seq.* They argue that the victim's state of mind is relevant only at the time the extortionate extension of credit is made, while the letter would show state of mind at the time the letter was written—more than two months after the extortion charged by the indictment.

Because the precise issue was never presented to the district court, we may not take notice of it unless it is a plain error "affecting substantial rights." Fed. R. Crim. P. 52(b). We have grave doubts whether the claim is cognizable under Rule 52(b); however, assuming that it is, we hold that Saperstein's state of mind at the time he wrote the letter was relevant to the crime charged.

While 18 U.S.C. § 891(b) defines an extortionate extension of credit as "any extension of credit with respect to which it is the understanding of the creditor and debtor *at the time it is made* that delay in making repayment * * * could result in the use of violence * * *," (emphasis added), 18 U.S.C. § 894(b) states that, "In any prosecution under this section * * * evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means * * *".

Section 894(b) makes clear the relevance of the victim's state of mind concerning attempts to collect the money owed. Even if the Saperstein letter could rationally show only his state of mind when the letter was written,[7] this apprehension goes directly to the means by which the defendants attempted to collect the money he owed them,[8] and the letter was therefore admissible for this purpose.

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[7] In fact, the special form signed by the jurors indicates that they considered the letter regarding Saperstein's state of mind at the time he wrote the letter.

[8] Defendants never requested the district court to instruct the jury that the letter might be relevant only to Counts III, IV, V and VI of the indictment—those charging collections of extensions of credit by extortionate means—nor did they object to the charge in this regard. We do not consider the failure of the judge to so instruct the jury *sua sponte* to be plain error under Fed. R. Crim. P. 52(b).

C. Admissibility of Medical Testimony Concerning Cause of Death

The final argument advanced by the defendants concerns testimony given by a physician as to the cause of Saperstein's death. Toward the end of the Government's case-in-chief, Dr. Edwin Albano, the State Medical Examiner was called. The defendants immediately objected, and at side bar demanded an offer of proof. In order to place in proper perspective the testimony given by Dr. Albano, it is necessary to examine in some detail the events which transpired at the side-bar conference.

The report of the autopsy which had been performed on Saperstein by Dr. Albano appears to have been in the hands of the Government, the defendants and the district court for some time prior to the conference.[9] Cecere's counsel initially objected on the ground that he believed Dr. Albano would testify that Saperstein died of acute arsenic poisoning, and that the jury would be asked to infer or would on its own infer that Cecere and DeCarlo had caused the arsenic to be administered to Saperstein. He stated that the evidence would be "grossly prejudicial in view of the fact that we have stipulated the date of death as being November 26th."

The United States Attorney then presented his offer of proof. During their cross examination of Mrs. Saperstein, the defense had brought to light that several days before Mr. Saperstein died, he had gone out to a restaurant where he ate and drank quite heavily. The Government reasoned that if the defense were attempting to raise in the minds of the jury the possibility that Saperstein died from overindulgence "as the result of a gastro condition"—which would contradict apprehension—the Government should

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[9] The Government offered the autopsy report itself earlier during its examination of Zelmanowitz. The offer was rejected, and instead the parties agreed to stipulate that Saperstein died on November 26, 1968.

be permitted to correct this misimpression by proving the true cause of death. He next argued that "if the defendants had a hand in the death of Mr. Saperstein, that would certainly be an overt act under the indictment as charged." As his third rationale for permitting Dr. Albano to testify, the United States Attorney's argument was "If Mr. Saperstein, because of his state of fear of them, in fear of further physical punishment, [committed suicide] that that would be legally relevant and material as bearing on his state of mind." [10]

Defendants' objections to the offer of proof were overruled, and Dr. Albano took the stand. Over renewed objections, he testified that the cause of Saperstein's death was "Acute arsenic poisoning." The district court denied defendants' contemporaneous motions for mistrial.

Saperstein's death certificate, indicating arsenic poisoning as the cause of death, was admitted into evidence after a defense witness had testified that Saperstein thought he had cancer. Objections by the defendants were again overruled.

In addition, the defendants requested the following point for charge.

> "I charge you that Louis Saperstein died from causes not attributable to these defendants. Therefore, you are not to think about or speculate as to the circumstances of the ingestion of poison and it should play no part in your discussions, deliberations, or decision."

The district court refused to charge the first sentence, but offered to include the second. The defense stated that such a course of action would be disadvantageous to them, and

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[10] As transcribed in the record, this statement seems to be somewhat garbled, either because of a mistake in transcription or because in the heat of argument the United States Attorney did not completely articulate his thoughts. It is apparent that the words "committed suicide" have been omitted from the argument.

the charge therefore omitted any reference to Dr. Albano's testimony.[11] The main thrust of the dissenting opinion is the failure of the trial judge, *sua sponte*, thereafter to instruct the jury that the evidence was to be "limited to Saperstein's state of mind." Defendants argue that whatever the probative value or relevance the testimony by Dr. Albano had regarding cause of death was so far outweighed by its prejudicial effect, defendants should be awarded new trials.

Before considering the relevance of, and the possible prejudice caused by, Dr. Albano's testimony, it is necessary to determine the standard by which the district court's ruling is to be judged. The weight of authority indicates that, "Determination of the admissibility of circumstantial evidence is a matter properly referred to the discretion of the trial judge and his ruling should not be disturbed except in the case of a clear abuse of discretion." United States v. Craft, 407 F.2d 1065, 1070 (6th Cir. 1969). This Court has also concluded that, "A trial judge in balancing the probative value of evidence against possible prejudicial effect is

[11] In its summation, the defense never referred directly to the cause of Saperstein's death, and the United States Attorney only briefly alluded to it when he said, "Your [sic] further heard testimony from Dr. Albano that he performed an autopsy on the exhumed body of Louis Saperstein on the 3rd day of December, 1968 and that he reached a conclusion as to the cause of death, acute arsenic poisoning." We should not here that while the district court gave no charge specifically referring to the arsenic poisoning testimony, the jury was informed, "Now, I must caution you here, ladies and gentlemen, on these conspiracy counts I have referred to 'offense against the United States.' The only offenses which the defendants are charged with conspiring to commit are those offenses that are set forth in what I have called the substantive counts. *There is no charge of conspiracy to commit any other offense*, and each count of the conspiracy relates directly to the substantive offense in another count of the indictment." (emphasis added). In light of the cautionary instruction we hold that failure to charge *sua sponte* on the use of the testimony of death by arsenic poisoning was not plain error within Fed. R. Crim. P. 52(b).

vested with broad discretion." United States v. American Radiator & Standard San. Corp., 433 F.2d 174, 203 (3d Cir. 1970), (Seitz, C.J.) cert. denied, 401 U.S. 948 (1971); *see* United States v. Schireson, 116 F.2d 881, 883 (3d Cir. 1941); C. McCormick, *Evidence* § 152 (1954). Rule 403 of the *Proposed Rules of Evidence for the United States District Courts and Magistrates* (Draft, November 19, 1971) reads in part: "Although relevant, evidence *may* be excluded if its probative value is *substantially* outweighed by the danger of unfair prejudice * * *" (emphasis added), thereby codifying the broad discretion vested in the district court. Thus, if the question whether Dr. Albano's testimony was admissible falls within the broad range of the trial judge's permissible exercise of discretion we should not disturb that ruling.

DeCarlo and Cecere assert that the testimony lacked any relevance or probative value whatsoever. We need examine only one of the prosecution's suggested justifications—that the evidence tended to show suicide—in order to dispel this contention. During the discussion of the Saperstein letter, *supra*, pp. 11-12, it was noted that for purposes of 18 U.S.C. § 894 the victim's state of mind even subsequent to the initial threat of harm is relevant in determining whether Saperstein was in a state of fear regarding collection of the debt.[12] If, in fact, Saperstein had committed suicide in response to the threats of the defendants, that act would be relevant to show the victim's state of mind regarding apprehension of the use of violent means to collect the debt. The Government, however, had offered no direct evidence of suicide caused by threats, and the question with which we are confronted, therefore, is whether, in light of the evidence previously introduced,

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[12] It appears that the state of mind of the victim is not only relevant to the crimes charged in the indictment, but an essential element to be proved by the Government. 18 U.S. C. §§ 901(6). *Compare* 18 U.S.C. § 1951 (the Hobbs Act).

death by arsenic poisoning was relevant to Saperstein's state of mind.[13]

Caught in the vortex, on the one hand, of the desirability of producing all relevant information, and, on the other hand, of excluding anything that may be unduly prejudicial, we face the task of balancing these two competing considerations.

A review of the testimony and exhibits which the jury had before it prior to Dr. Albano's taking the stand indicates that Saperstein was terrified of Cecere and DeCarlo. He had begged Zelmanowitz for money to meet his "vigorish" payments. Saperstein had attempted to run away from a scheduled meeting with Cecere in New York City. When that meeting took place, Saperstein offered to take out an insurance policy with Cecere as beneficiary and jump out of a window. Saperstein was then taken to Weiland's Restaurant where he was severely beaten and threatened. The testimony of Mrs. Saperstein further indicated the fear in Saperstein's mind. The evidence tends to demonstrate that Saperstein was so fearful of further physical punishment and for the safety of his wife and family that the jury could reasonably infer that he had committed suicide in order to obviate these apprehensions. Dr. Albano's conclusion of death by ingestion of arsenic was, therefore, relevant to Saperstein's state of mind as it had been developed through the testimony of Zelmanowitz and Mrs. Saperstein.

Our next inquiry must be whether the testimony in question was probative on the issue of Saperstein's state of mind, in other words, whether the fact of death by arsenic can rationally tend to show state of mind. If the

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[13] An excellent definition of relevance may be found in Rule 401 of the proposed Rules of Evidence, *supra*. " 'Relevant evidence' means having *any* tendency to make the existence of *any fact* that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." (emphasis added).

jury gave credence to Zelmanowitz and Mrs. Saperstein, they could logically have concluded that Saperstein was a man possessed by fear and capable of taking extreme action in order to secure the money needed to pay his debt and to protect his family. The jury could have concluded that suicide was in Saperstein's mind, and that ingestion of arsenic was one means of accomplishing that end. Thus Dr. Albano's statements could have provided one of the links in proving a necessary element of the crimes—fear on the part of the victim of the extortionate plan.

Even though the evidence may be relevant and probative, prejudice arising from its introduction may be so great that it should be excluded. The prejudice claimed by the defense is that the testimony suggested commission of a criminal act by the defendants not specified in the indictment. They argue that the jury was invited to speculate that DeCarlo and Cecere murdered Saperstein or played a role in having him killed.[14] If the evidence could serve no purpose other than to cause unwarranted speculation by the jury as to the hand which wrought Saperstein's death, we might tend to agree with the defendants. Here, however, the testimony tends to harm the defendants only to the degree that the jury believed what had already been presented to it. The evidence of death by arsenic poisoning,

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[14] It is possible that the suggestion of murder would have been stronger had the fact of death by arsenic poisoning not been introduced. Evidence then would have shown that Saperstein was very afraid of DeCarlo and Cecere, perhaps even paranoid. He was savagely beaten on September 13th, and threatened with death by both defendants. He then wrote a letter to the F.B.I., mailed the day before he died, expressing his fear and his belief that his life was as good as ended. The following day he died. The jury might then have concluded that Saperstein had been killed.

As the trial actually developed, the inference of suicide became fairly plain. It is pertinent to note that the only evidence tending to show death by other than suicide—murder—was introduced by the defense when a nurse testified that she heard Saperstein tell a doctor in the hospital on the day he died that "someone had put some silver stuff on his food at lunch today. * * * "

standing alone, could not establish that the defendants were evil individuals. In fact, if the jury were to conclude that DeCarlo and Cecere were evil men, that conclusion would be based on Zelmanowitz's testimony of the beating and the threats, not on Dr. Albano's testimony as to cause of death. To the extent that proof of the cause of death led the jury to infer suicide, the conclusion was not improper were the jury to believe that the beating, the threats and the offer to commit suicide all occurred.

It is contended by the defendants, though, that the real prejudice comes from the possibility that the jury would in essence find DeCarlo and Cecere guilty of murder, and therefore decide that they must be guilty of the lesser crimes actually charged. It is to prevent juries from reasoning in this fashion that proof of uncharged crimes is generally inadmissible. A review of the leading cases discussing the rule, however, shows either their support for admitting the evidence here in question or their inapplicability in this situation. In Michelson v. United States, 335 U.S. 469 (1948), the defendant was accused of bribing a federal officer. In his defense he called a number of witnesses who testified to his good character. On cross-examination, the Government asked the character witnesses if they knew that the defendant had been arrested 27 years before on a charge of receiving stolen goods. The Supreme Court affirmed the conviction, reasoning that even though proof of prior arrest would tend to show bad character, the probative value of the testimony to impeach the credibity of the character witnesses was sufficient to permit the proof. See, United States v. Gray, ——— F.2d ——— (3d Cir. No. 71-1430, March 6, 1972). Likewise, here, the evidence served the legitimate purpose of providing a basis from which the jury could reasonably infer suicide, even though there existed the possibility that the jury might misuse the evidence.

This Court, in Virgin Islands v. Oliver, 360 F.2d 297 (3d Cir. 1966), reversed a conviction because the prosecu-

tion proved that the defendant, accused of assault and escape from custody, had once before been convicted for the same acts. Citing United States v. Sweeney, 262 F.2d 272, 277 (3d Cir. 1959), the Court stated, "If the testimony of other offenses does *no more than* show propensity to commit a given crime it is error to admit it." 360 F.2d 299 (emphasis added). In the present case, the evidence of death by arsenic poisoning by itself did not show any propensity to commit a crime on the part of the defendants. That evidence became relevant only insofar as the jury, based on the testimony already adduced, believed that the defendants had bad character. As opposed to the prosecutor's actions in *Oliver*, the Government here did not seek first to prove the bad character of the defendants and then to prove the crimes charged. Rather, by proving the crime first, from which proof the jury was certainly entitled to infer bad character on the part of the defendants, the Government then introduced evidence which tended further to show Saperstein's state of mind.

The dissenting opinion concerns itself not so much with the evidence of death by arsenic poisoning as with the omission of a charge limiting the jury's use of the evidence. The defense did offer a point for charge in this regard, and the trial judge was willing to instruct the jury, "[Y]ou are not to think about or speculate as to the circumstances of the ingestion of poison and it should play no part in your discussions, deliberations, or decisions." But, because the evidence in no way would support the first sentence of the charge that, "Louis Saperstein died from causes not attributable to these defendants," the district court properly refused to include this sentence. The defense then made clear that if both sentences were not read to the jury, they did not wish to have the second given alone. In addition, they chose not to submit an alternative charge on this subject, and did not object to the charge's lack of any reference to Saperstein's death by arsenic poisoning.

The dissenting opinion, however, views the colloquy concerning the point that was submitted as sufficient to pre-

serve any complaint the defense might have with regard to the omission of reference to the evidence. Fed. R. Crim. P. 30 states: "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, *stating distinctly the matter to which he objects and the grounds of his objection.*" (emphasis added). Because there existed no evidence to support it, the defense clearly was not entitled to the requested charge. In the absence of an alternative request or specific objection to the omission, it would be unreasonable to expect a judge to construe an ill-founded submission of a point for charge as a request for a limiting instruction by arsenic poisoning. Therefore, the requirements of Rule 30 have not been met, and the plain error requirement of Fed. R. Crim. P. 52(b) is squarely before us. As indicated in note 11, *supra*, when read as a whole, the district court's charge, especially that portion limiting the jury to deciding only the crimes enunciated in the indictment, sufficiently circumscribed the use the jury could make of the evidence, so that the omission could not constitute plain error.

Even if we were not bound by the concept of plain error and the proscriptions of Rule 30, we would not hold that the district court abused its discretion when it did not give a limiting charge. Following the discussion during which the judge eventually properly refused to read the entire defense point for charge, the court was presented with a choice—whether he should fashion his own charge on the evidence, or rely on the general portions of his charge which instructed the jury to consider the evidence only with regard to the crimes set forth in the indictment. *See*, note 11, *supra*. It is crucial here to understand that the district court, and not this court of appeals, was in a position to judge the impact the evidence and closing arguments of counsel had on the jury, and most important, the potential effect of any charge he might give. The evidence of death by arsenic poisoning is not analogous to the Saperstein letter, and did not necessitate a separate

cautionary instruction. One unversed in the law would be tempted to read a letter for the truth of its statements, and without being told specifically otherwise, would no doubt do so. With regard to the evidence of arsenic poisoning, however, there is every reason to believe that a charge instructing the jury to consider the evidence only as it related to the crimes alleged in the indictment, would preclude them from misusing the evidence.

We are in complete accord with Judge Murrah's statement in Sumrall v. United States, 360 F.2d 311, 314 (10th Cir. 1966), that "the question is not solely whether the appellants have been proven guilty, but whether guilt has been established according to the procedural safeguards to insure trial before a fair and unprejudiced jury." Here; however, the Government did not attempt affirmatively to prove any prior criminal records of Cecere and DeCarlo, thereby implanting in the minds of the jurors the notion that the defendants were evil men. Any such belief could have come only from the testimony of Zelmanowitz and Mrs. Saperstein properly admitted. While it was possible that such testimony could be misused by the jury, the evidence of death by arsenic poisoning served a legitimate purpose—providing a link to determine Saperstein's state of mind. Under these circumstances, it was not an abuse of discretion for the district court to permit Dr. Albano to testify as he did.[15]

Accordingly, the judgments of conviction will be affirmed.

SEITZ, *Chief Judge*, concurring.

I seriously doubt that the evidence of arsenic poisoning was admissible. However, I am now satisfied beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Cf. Schneble v. Florida, 40 LW 4299 (1972). First, the unsullied evidence of guilt

[15] The same reasoning applies with equal force to the subsequent admission of Saperstein's death certificate during government cross examination of a defense witness.

was most substantial. Furthermore, the combined effect of other evidence properly before the jury was as damaging on the "murder" theme as was that of arsenic poisoning, particularly: (1) Saperstein's letter to the F. B. I. disclosing that defendants had threatened to kill him and his family, and (2) the stipulated date of Saperstein's death—one day after the mailing of the letter. Regardless of the evidence of arsenic poisoning, the jury could well have concluded that defendants in fact were responsible for Saperstein's death. Realistically, no instructions could have prevented the jurors from drawing this inference. Thus, I do not believe that the evidence of arsenic poisoning, presumably inadmissible, had any significant impact on the verdict. The best indication that the jury directed its attention to the crime charged is found in the fact that two hours after the jury retired it returned to ask the court for a review of the definition of "extortionate means."

ALDISERT, *Circuit Judge*, dissenting.

This appeal puts this court to the exacting test of deciding objectively whether a new trial should be ordered where there is overwhelming evidence that the appellants were guilty of the crimes for which they were indicted, and impressive indications that they were nefarious leaders within the internal structure of organized crime in America. As disclosed by the majority's account of appellants' sordid roles in the loanshark-extortion racket, there is little in their conduct capable of generating a sympathetic judicial environment for them and for their ilk. Thus postured, this appeal provides an ideal vehicle for testing the appellate judicial process, for the reviewing court has no authority to determine the appellants' guilt or innocence; this is the exclusive province of the fact finder. The appellate function is severely and strictly limited to a determination of whether error of law, of the type properly cognizable on review, took place in the trial proceedings. I am convinced that such error occurred in this case, and that it was reversible error, compelling a new trial.

The precise error was that the court, having permitted, over defense objection, the introduction of evidence that Saperstein died of arsenic poisoning, failed to give the jury any instruction concerning the relevancy or materiality of this evidence. Indeed, the court at no time offered any explanation as to why the evidence was in fact admitted, even though faced with alternative justifications urged by the government and strenuously objected to by the defense. Appellants were charged with and tried for two crimes: making extortionate extensions of credit, 18 U.S.C.A. § 892, and collecting extensions of credit by extortionate means, 18 U.S.C.A. § 894. To prove its case, the government presented formidable testimony disclosing overt acts by the appellants of threats and actual violence to Saperstein, all of which was relevant under 18 U.S.C.A. § 894(a), employing extortionate means to collect or attempt to collect the debt and punishment for nonrepayment thereof.

Because these threats and acts of violence constituted the principal thrust of the government's case, the cause of Saperstein's death was an issue not completely free of potential prejudice. Indeed, the introduction into evidence of death by arsenic poisoning was potentially generative of substantial prejudice unless accompanied by appropriate limiting instructions by the court.

The majority confine their opinion to a post-trial dissertation of how this evidence could have been considered relevant on the issue of Saperstein's state of mind. Although I am in agreement with much, but not all, of this careful exposition, the fatal deficiency in the majority's presentation is that it fails to rehabilitate the glaring procedural infirmity at trial—the failure to instruct the jury how they should appropriately consider this evidence in their deliberations. An analysis which simply discloses possibilities of relevancy *in vacuo* does not assuage the real jurisprudential hurt: permitting this evidence to hang like an unharnessed omnipresence capable of unrestricted

use by the jury, including a use which even the government now concedes to be improper.

It was the contention of the government at trial that the evidence was relevant in three particulars:

1. to counteract the inference suggested by defense cross-examination that Saperstein died of natural causes;

2. to show that defendants "had a hand in the death of Mr. Saperstein, that would certainly be an overt act under the indictments as charged;"

3. "[i]f Mr. Saperstein, because of his state of fear of them, in fear of further physical punishment, [committed suicide], that would be legally relevant and material as bearing on his state of mind."

The majority quite properly do not attempt to defend the government's first contention. The rather innocuous defense cross-examination of the victim's widow revealed that Saperstein was drinking one evening and did not drive the family car home. At trial the government contended this created the inference that Saperstein died of natural causes, thus permitting introduction of the arsenic ingestion to show the actual cause of death. I believe it strains logic to the breaking point to say this cross-examination raised a permissible inference of the cause of death. In any event, the court gave no instruction so limiting its use.

The second justification urged by the government at trial—proof of overt act under the indictment—was also not approved by the majority, and properly so, for the government itself now concedes that this evidence was neither relevant to nor admissible in the government's case in chief as proof of homicide.[1] Under the circumstances revealed

[1] At reargument the government conceded that the evidence was neither relevant nor admissible on this ground:

Judge Aldisert: I take it then that you are saying . . . You did not introduce this to show suicide.

U.S. Attorney (Stern): Absolutely.

at trial, proof of coerced suicide would have been tantamount to proof of murder. Taking another's life by poison is murder whether the deadly ingredient is unwittingly ingested by the victim as a result of the connivance of a criminal actor, or knowingly ingested, under threat, force, or duress at the hands of that actor. Of course, the government's concession has removed consideration of this as evidence of the overt act of murder or coerced suicide. The

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Judge Aldisert: But are you saying that if you did, it would have been relevant?

Mr. Stern: No, . . . But I will stand by my statement that the government at no time intended to prove that the defendants murdered Louis Saperstein.

• • • •

Judge Aldisert: Let me start over again. In the government's case, doing what you did do, only what you did do, in the government's case, would it have been admissible, relevant evidence to show homicide on the part of the defendants?

Mr. Stern: No.

Judge Aldisert: All right.

Mr. Stern: I suggest obviously you can't prove just because a man bought a gun, if you don't intend to prove he pulled the trigger.

After the trial court admitted the evidence over objection, the defense had every right to attempt to mollify the effect of the government's evidence and inquire further into the issue opened by the government. This it could do without waiving its previous objection.

It has long been the rule that when a party's objection is made and overruled, he is entitled to treat that ruling as the "law of the case" and to explain or rebut, if he can, the evidence which has come in over his protest. Consequently, a party does not waive his objection if he meets the evidence to which he objected with other evidence which under the theory of the objection would be incompetent. *United States* v. *Modern Reed & Rattan Co., Inc.* 159 F.2d 656 (2nd Cir. 1947), *cert. denied*, 331 U.S. 831 (1947); McCormick, Law of Evidence § 55, at 129-130 (1954); 1 Wigmore, Evidence, § 18, at n. 36 & 36a (3d Ed. 1970 Supp.); *cf.*, *Trouser Corp. of American* v. *Goodman & Theise, Inc.*, 153 F.2d 284, 288 n. 6 (3d Cir. 1946). That rule is applicable here.

majority agree stating, "The government, however, had offered no direct evidence of suicide caused by threat, and the question with which we are confronted therefore, is whether, in light of the evidence previously introduced, death by arsenic poisoning was relevant to Saperstein's state of mind." (Slip opinion, p. 16.) "They (the defendants) argue that the jury was invited to speculate that DeCarlo and Cecere murdered Saperstein or played a role in having him killed. If the evidence could serve no purpose other than to cause unwarranted speculation by the jury as to the hand which wrought Saperstein's death we might tend to agree with defendants." (Slip opinion, p. 17.)

But the majority would legitimate the admission of this evidence for the third reason advanced by the government at trial: "While it is possible that such testimony could be misused by the jury, the evidence of death by arsenic poisoning served a legitimate purpose—providing a link to determine Saperstein's state of mind." (Slip opinion, p. 23.)

Assuming, without conceding, the propriety of admissibility for this limited purpose, the prejudicial trial error is that neither the government nor the trial court informed or instructed the jury that the evidence was to be so received and that their consideration was to be so restricted. This is to be contrasted with the meticulous care accompanying the introduction of the Saperstein letter as state-of-mind evidence described in Part B of the majority opinion. In introducing the letter the government stated, "These documents are offered for the limited purpose of showing the state of mind of the victim in this case." Contrariwise, when the arsenic evidence was introduced, the government insisted that it was also admissible on two other grounds—rebutting the inference of death by natural cause and proof of overt act. Both of these grounds, as heretofore observed, have now been rejected. Moreover, in the Saperstein letter, the court not only gave a limiting instruction, but insisted that, upon returning the verdict,

each juror "[sign] a pledge that he had considered the letter only in order to determine Saperstein's state of mind."

I agree completely that "the letter was admitted for a narrow purpose, the trial court properly instructed the jury concerning their use of the contents of the letter, and the jury was capable of drawing the required distinction in order that the defendants would not be unduly prejudiced." (Slip opinion, p. 11.) However, the same instructions for restrictive use should have been prescribed for the arsenic evidence, the other evidence limited to Saperstein's state of mind. Further, although I do not believe that the separate juror "pledge" was necessary, such an unusual precaution for the reception of one piece of potentially prejudicial state-of-mind evidence would create an *a fortiori* situation for comparable evidence.

Nor am I persuaded that this trial error can be swept under the jurisprudential rug in the guise of trial court discretion. It may have been discretionary for this court to have received this state-of-mind evidence, but once the discretion was exercised and the evidence admitted, a mandatory duty descended upon the court to inform the jury that they did not have unfettered use of this evidence and that it had to be utilized for a limited purpose only. *United States* v. *McClain*, 440 F.2d 241, 245-246 (D.C. Cir. 1971). See also *Commonwealth* v. *Amos*, — Pa. —, 284 A.2d 748, 750 (1971); *Commonwealth* v. *Wright*, 415 Pa. 55, 61, 202 A.2d 79, 82-83 (1964).

Nor do I reach the question of plain error. This evidence was the subject of a specific point for charge which was duly presented and was the subject of colloquy between the court and counsel both prior to the charge as well as thereafter.[2]

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[2] Even accepting the majority's view, that the extensive concern generated by defense counsel did not amount to a formal objection, I am persuaded that plain error was present here as in *McClain*.

In view of the government's concession that it was improper for this evidence to be considered as proof of an overt act of homicide, and the majority's suggestion that such consideration by the jury, without more, would have been prejudicial to the appellants, the failure to give a limiting instruction cannot be construed as harmless error. Clearly there is a "reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy* v. *Connecticut*, 375 U.S. 85, 86-87 (1968); *Chapman* v. *California*, 386 U.S. 18, 24 (1967); *McClain, supra*, at 246.

I conclude that a new trial is necessary. Although I reach this conclusion unhappily and reluctantly, I am convinced that the federal courts are guardians of the rights of all members of society, the rich and the poor, the good and the bad. We owe them all one guarantee; the guarantee of a trial that is fairly conducted, wherein it is as important that the procedure utilized in obtaining a verdict be as just as the verdict itself.

Societal order is achieved by enacting standards of conduct, the breach of which subjects the violator to sanctions. The threat of punishment is designed to preserve this order

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supra, where the evidence was admissible for only one purpose, to prove malice in a homicide case, and inadmissible for other purposes:

> We would hold that whenever evidence is admitted for a limited purpose, it is plain error, in the absence of manifest waiver, to omit an immediate cautioning instruction. The danger of prejudicial effect from such evidence is so great that only an immediate and contemporaneous instruction can be considered sufficient to protect defendants. As long as we continue to have rules of evidence which admit testimony for some purposes but not for others, we must guard against its misuse by the jury.

440 F.2d at 246. *Cf.*, *United States* v. *Carter*, 401 F.2d 748 (3d Cir. 1968), where the evidence was admissible for several purposes and inadmissible only to show disposition or propensity to commit crime.

and to deter its breach. It is the genius of the American system that before an alleged transgressor of these standards may be found guilty and thus have punishment visited on him, he is entitled to and is guaranteed an adjudicatory process which is severely regulated and rigidly controlled by procedural rules.

Thus, although it is necessary that those who in fact break standards of conduct be punished and punished properly, it is equally necessary for society itself to observe the rules it has established for the conduct of judicial procedures.

There must be a proper vindication of both rights—society's right that its standards of conduct, or laws, be obeyed, and the individual's right that organized society respect the rules it has established for the conduct of the guilt-determining process. Anything less offends our tradition; and any finding of guilt under the former without a scrupulous respect for the letter yields a conviction that is infirm and legally assailable even where, as here, there is formidable suspicion, if not evidence, that those accused have long participated in a life-style of studied defiance of the standards of societal conduct.

I would reverse the judgment of conviction and remand for a new trial.

KALODNER, *Circuit Judge*, dissenting.

I join in Judge Aldisert's view that reversible error was committed when the trial court "failed to give the jury any instruction concerning the relevancy or materiality" of the Government's evidence that Saperstein died of "acute arsenic poisoning." I fully subscribe to Judge Aldisert's keen critical analysis of the impact of the trial court's error. I can only add that the trial court's failure to instruct the jury with respect to the arsenic poisoning cause-of-death evidence left it like a "dangling participle" in the rhetoric of the court's otherwise adequate charge.

I would also reverse for the reason that the trial court prejudicially erred when it permitted the Government to adduce evidence that Saperstein's death was caused by "acute arsenic poisoning."

The causal factor of Saperstein's death had as much relevance in this case as "[w]ho killed Cock Robin?". There was not a scintilla of evidence connecting the appellants with Saperstein's death. Moreover, the Government and the defendants had entered into a Stipulation that Saperstein had died prior to the trial, and that Stipulation was a "cut-off" as far as the cause of his death was concerned.

It cannot be challenged that the arsenic poisoning evidence, taken at the maximum, could have led the jury to conclude that Saperstein was murdered by the defendants, and at the minimum, that the defendants had driven Saperstein to suicide—self-murder. Thus the admission of the arsenic cause-of-death testimony served to convert this trial into a murder trial instead of one for violation of the federal statutes prohibiting extortionate credit transactions. Indeed, the majority here holds that ". . . the evidence of death by arsenic poisoning served a legitimate purpose—providing a link to determine Saperstein's state of mind," and that "[u]nder these circumstances, it was not an abuse of discretion for the district court to permit Dr. Albano to testify as he did."

I disagree most vigorously with that holding.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18,705 and 18,706

UNITED STATES OF AMERICA

vs.

ANGELO DE CARLO,
DANIEL CECERE,
JOSEPH POLVERINO,
PETER LANDUSCO,

ANGELO DE CARLO, *Appellant in No. 18,705*

DANIEL CECERE, *Appellant in No. 18,706*

(D.C. Criminal No. 382-69)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: SEITZ, *Chief Judge* and KALODNER, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, ROSEN and HUNTER, *Circuit Judges*

Judgment on Reargument

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was reargued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, filed March 4, 1970, be, and the same are hereby affirmed.

Attest: THOMAS F. QUINN, Clerk,

April 4, 1972
Received & Filed
Apr. 4, 1972
Thomas F. Quinn
Clerk

APPENDIX F

The New York Times

The average circulation figures for 1969 follow:

Daily 895,505
Saturday 728,908
Sunday 1,445,507

The following summary was made from the Late City Edition.

On January 6, 1970, The NewYork Times covered the trial with a story that appeared on page 48 of the newspaper and was headed, "Jury Is Selected and 'Isolated' for DeCarlo Trial in Jersey."

After the transcripts were released, the Times gave the trial front page treatment. The three columns at the upper right hand of the front page were used. An uncomplimentary photograph of petitioner DeCarlo was printed. The headline for the case was, "Lacey Charges DeCarlo with 'Terror' in Extortion." The subheading read, "Saperstein Forced Out of Hotel and Beaten, Prosecutor Says." The story on the release of the tapes was headlined "New Tapes by F.B.I. Link Politicians to Jersey Mafia." Three subheadings followed: "Lacey Releases Transcripts As DeCarlo Faces Court on Extortion Charge," "Payoffs are Indicated," "Kenny, Carey and Wilentz Among Leading Names Used on Recordings."

The front page stories were comprehensive and were continued on page 29, using half the page. In addition, on page 28, the Times published a full page of excerpts from the transcripts. Said the Times, "They were made at places frequented by Angelo (Gyp) DeCarlo—identified as Ray—who is a defendant with three others in a conspiracy extortion trial now in progress in Federal Court in Newark." The defendants Polverino and Landusco were mentioned in

the transcripts with DeCarlo, but DeCarlo's name was repeated over and over again as in the Newark newspapers.

On January 8th, the Times devoted almost a full column, on its front page, to the transcripts. The headline was, "Jersey Lenders Deny Mafia Ties Implied on Tapes." The subheading was, "Wilentz Terms References to Links with Gamblers a 'Total Fabrication'." This front page story also discussed the trial and the petitioner DeCarlo's participation in the conversations. The story was continued on an inside page. In addition, nearly two full pages were devoted to the trial and the transcripts. On the same day, the Times ran an editorial entitled "Transcripts and Freedom," which said, in part, the following:

> "* * * The activities and names of various people mentioned make interesting reading; but the method of disclosure scarcely makes for good law.
>
> "This trial by evidence gathered through F.B.I. electronic eavesdropping affects not only Angelo DeCarlo and three other defendants but dozens of individuals not under indictment. Now that their names have come out as part of an unsworn record, with no warning and no opportunity for examination and reply, they are suddenly on the defensive and called upon to offer denials outside of court in response to illegally obtained conservations.
>
> * * * * * * *
>
> "If Federal judges and United States Attorneys are now willing to use any means—including publicizing evidence in and out of court—it will be up to the Supreme Court to remind them that freedoms are still foremost in the Constitution."

The story continued to occupy the front page of The New York Times. On Friday, January 9, a front page headline was "Hughes Condemns Release of Tapes." The subheading was, "Charges F.B.I. Transcripts Victimize the Innocent and Endanger Freedom." A photograph of the petitioner

DeCarlo, three columns wide, also appeared on the front page. Once more, in addition to the front page, a full page was devoted to the trial and the transcripts, with more excerpts and more stories. Another story appeared on the front page of the Times on Saturday, January 10th. The Times then continued to publish a comprehensive report on the trial each day.

The Sunday edition of the Times of January 11th contained an article on the transcripts from which the following two paragraphs have been taken:

> "The Federal Government has an untold amount of startling transcripts of underworld conversations that it eavesdropped illegally, but it is doubtful now whether they will ever be made public.
>
> • • • • • • •
>
> "Among others still in FBI files are records of additional New Jersey buggings and some made in New York, Philadelphia, Buffalo, Pittsburgh and other known centers of Mafia activity.

The article also mentioned other transcripts of electronic eavesdropping which were disclosed to the public, and DeCarlo was again mentioned prominently in an excerpt of the conversations. The New York Times Magazine had, as its feature story, an article on the trial entitled, "The People v. the Mob; Or, Who Rules New Jersey?"

The Times continued to report on the trial from January 20th until January 28th, 1970, when the trial was back on the front page with the headline, "DeCarlo and Cecere Guilty In Extortionate Loan Case."

The Newark Evening News

The average circulation figures for 1969 follow:

Daily 284,218
Saturday 187,135
Sunday 429,830

The following editions were used for this summary:

Daily: City-County Edition
(Essex-Union-Morris)
Saturday: Sports Final Edition
Sunday: Final Edition

On January 7, 1970, the front page of the Evening News had this headline in large print running across the top of the entire page: "Top Names Included in New FBI Tapes on Mafia's Influence in N. J. Politics." Three stories began on the front page and were continued on inside pages. One story was headlined, "Saperstein Foresaw Fate." Numerous stories about the contents of the transcripts were published on pages 4 through 9, and 14. Two Saperstein letters to the FBI were reproduced on page 6 in their entirety plus typewritten copies as deciphered by the newspaper. A picture of the petitioner DeCarlo, two columns wide, also appeared on the front page.

On January 8th, this was the feature headline across six of the eight front page columns: "New Mafia Tapes Seen Crime War's 2nd Front." Under this front page headline, the Evening News reported that U. S. Attorney Frederick B. Lacey, in a speech delivered in Glen Ridge on November 18, "called for the 'white light of publicity' to be brought to bear on wrongdoers, while the heat of prosecution is applied in the courts." Two more stories appeared on the front page. One covered the transcripts and was headlined, "Said Carteret 'Ice' Spread Too Thickly." In addition, numerous stories appeared on pages 8 through 15 of the newspaper, and an editorial appeared on page 26.

On January 9th, three more stories appeared on the front page of the Evening News, and were continued on inside pages. The Evening News also reported that then Governor Richard J. Hughes of New Jersey denounced the release of the transcripts of Mafia conversations. He stated, "* * * Let those who have committed actual wrong be indicted and

prosecuted swiftly. But let us not unleash again in this land the demons of hearsay and slander which, in a jungle of suspicion, can harm the most honest of men." The Evening News also published another editorial on the transcripts and the Mafia.

On Sunday, January 11th, another front page story appeared on the Mafia. The petitioner DeCarlo and the transcripts were mentioned. The title ran across three columns: "Mafia Hooks Found in Many Businesses." The front page story was continued on page 17 where another story appeared entitled, "DeCarlo Scoffed at Notoriety." Conversations taken from the transcripts were repeated. Also, a third editorial appeared on page C, Section 2.

On Monday, January 12th, the saturation of the community continued. Another story appeared on page 5 which mentioned petitioner DeCarlo in a conversation and was entitled, "Tape Shows Mobsters Don't Like or Trust Boiardos." On the same page, another story reported that the Superintendent of the New Jersey State Police, who was mentioned in the transcripts, suffered a heart attack.

Still another story in the issue of January 12th (page 7) contained a candid statement by the United States Attorney for the Southern District of New York, Robert M. Morgenthau. He stated in a television interview that the release of the FBI transcripts in the DeCarlo trial posed "very serious dangers" in the case, and could "seriously affect the outcome" of the Government's case.

On January 13th, the Evening News reported on the trial on page 7. On January 14th, the transcripts made the front page again in a lengthy story. On January 15th and 17th, the trial made the front page again.

On January 20th, the report on the trial was on page 5, and on January 21st, the trial was reported on page 37. But on Friday, January 23rd, the front page once again had a story. This one was entitled, "Lacey Warns Press

on Mob." The trial was reported on page 19 that day. On January 24th and 27th, the trial was back again on the front page. As the trial approached its end, the issue of January 28th had a front page story entitled, "Jury Set to Weigh Loansharking Case," with petitioner DeCarlo's picture next to the story.

The petitioner DeCarlo and Daniel Cecere were convicted on January 28th. The following day, the Evening News made it the front page story once more. Two full length pictures of the two defendants appeared at the top left hand side, each two columns wide and six inches high. The trial continued to occupy the front page on January 30th with a story about the trial judge's explanation of his reason for releasing the transcripts.

The Newark Star-Ledger

The average circulation figures for 1969 follow:

Daily 230,965
Saturday 226,594
Sunday 416,248

The following summary was made from the Final Edition.

On January 7, 1970, the feature story on the front page of the Star-Ledger in large black letters was entitled, "More Mafia Tapes." The subheading was, "Profits roll in from payoff, Vegas, loansharking." A photograph of the petitioner DeCarlo was also on the front page. Two other stories about the transcripts also appeared on the front page, and DeCarlo's name was mentioned repeatedly. One story was entitled, "Mob put up the bankroll for favored candidates." The other story had the heading, "Spina, Capelo are mentioned in transcripts." The front page articles were continued on pages 6, 8, 18, with additional articles on pages 6 and 7. The headings were, "13 Volumes of Bugged Testimony," "Judge releases sensational tapes at DeCarlo trial," "Two Secret Organizations," "Mafia-

Mason lodge . . . or the mob goes All-American," "Calls Others 'Scabs' For Low Interest," "Konigsberg boasts of huge loansharking profits," "Mob put up cash for favored candidates," "The finer points of poisoning," "Newark Election in 1962, A discussion on the mob's help to Addonizio," "Sinatra was considered for Jamaica hotel loan," "Saperstein told FBI he feared for his life." The petitioner DeCarlo was mentioned repeatedly in every story.

On January 8th, the feature story on the front page was once again the trial and the Mafia conversations. A picture of "The Barn", where the FBI electronically eavesdropped on the conversations, and a picture of the petitioner DeCarlo and one Anthony Russo accompanied the story entitled, "Tattle-tapes: Gyp, Russo Reminisce . . ." Additional headlines were, "From Outrage to Indignation," and "Officials deny Mafia connections." The front page stories were continued on pages 4 and 7, with additional articles on page 6 under the headings, "DECARLO TRIAL: Partner says Saperstein was incoherent with fear," and "LIBELOUS TAPES? Keuper suing DeCarlo and Russo." On Page 18, the Star-Ledger ran an editorial on the transcripts which covered the entire editorial column. It was entitled, "A sordid chapter."

On January 9th, the trial and the transcripts were again on the front page. The headings were, "Assails Release of Tapes; Hughes denies meeting Mafia figure," and "DeCarlo foe bares own guilt." The stories were continued on page 8, where another article appeared under the heading, "Records contradict tapes on a Pike paint contract."

On Saturday, January 10th, the trial was on the front page under the heading, "A million in stock swindles." The story was continued on page 5. Another article appeared on page 18 entitled, "Compared to the powerful Mafia, Panthers are kittens."

On Sunday, January 11th, the transcripts continued to be the feature front page stories. The headings were, "Tapes

tell of gambling in 'every city'," and "THE BARN . . . a peek into DeCarlo's exclusive 'social club'." The stories were continued on pages 9 and 12. On page 9, the heading was, "CONVERSATION FROM TAPES." On page 12, four large photographs of "The Barn" accompanied the story. On Pages 10 and 11, additional articles were published. The title on page 9 was "LAWYER'S LAMENT: Tapes tell of Bozza's troubles in court." The article was highly unfavorable. It mentioned one of the defense attorneys in this case and quoted a conversation between the petitioner DeCarlo and another defense attorney in the case. On page 11, the headings were "Tapes reaction: Private smear v. public good," and "U. S. jury probes continue but little action expected." Photographs of the petitioner DeCarlo and U. S. Attorney Lacey accompanied the stories.

On Monday, January 12th, the trial proceedings were brief and the next day the trial was reported on page 6 under a heading which ran across three columns, "DeCarlo trial recesses for tests on a defendant." On the same page, a story concerning the transcripts appeared under the heading, "Former top cop Capelo denies any wrongdoing."

After the sensational publicity on the transcripts had run for about a week, the Star-Ledger did not report on the trial again until Friday, January 16th. The story appeared on page 5 and was headed, "DeCarlo witness talks of Swiss bank account." On January 17th, the heading was "DECARLO TRIAL: Court orders defense to present its case." On January 20th, the story was on page 4, "DeCarlo's lawyers pore over secret jury testimony." On January 21st, it was on page 5, "DeCarlo judge bars daughter of star witness." On the same page, two stories also appeared about U. S. Attorney Lacey entitled, "Lacey renews call for more judges," and "Lacey squelches reports of a race for the Senate." On January 22nd, the trial made the front page again under the heading "Nurse Recalls Victim's Complaint." The story was continued on page 4. On January 23rd, a story appeared on the front page in which U. S.

Attorney Lacey was reported as defending the release of the taped materials as being "In the public interest" and "important to the fight against crime." The heading was, "Public needs to be jolted on crime: Lacey."

On January 24th, the trial was reported on page 2. The heading was, "DECARLO TRIAL: Judge orders extra session for speedier justice." Another story appeared on the same page under the headings, "'PERSONS NAMED CAN'T RESPOND,' Sills wouldn't have released DeCarlo tapes."

On Sunday, January 25th, a story about the trial appeared on page 6 entitled, "Doctor says victim spoke of 'powdery substance'." There was a story about the release of the transcripts of conversations of reputed Mafia members. The headings was, "'AN ORGY OF PUBLICITY,' Sils says Cahill exploited crime issue." On Wednesday, January 28th, the trial was reported on page 7 under the heading, "DECARLO TRIAL: Prosecution, defense sum up with a clash." Another story appeared on the same page entitled, "Name on tape takes the Fifth to all questions."

On January 29th, the trial was returned to the front page as the feature story accompanied by a photograph of the petitioner DeCarlo. The headings were, "JURY DELIBERATES 3 HOURS" and "DeCarlo, Cecere guilty of extortion." The case was still on the front page on January 30th, under the heading, "Judge decides Tuesday if DeCarlo keeps his bail."

APPENDIX G

Constitution of the United States

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statutes

18 U.S.C. Sec. 2 *Principals*

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. SEC. 891 *Definitions and Rules of Construction*

For the purposes of this chapter:

(1) To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

(2) The term "creditor," with reference to any given extension of credit, refers to any person making that extension of credit, or to any person claiming by, under, or through any person making that extension of credit.

(3) The term "debtor," with reference to any given extension of credit, refers to any person to whom that extension of credit is made, or to any person who guarantees the repayment of that extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom that extension of credit is made to repay the same.

(4) The repayment of any extension of credit includes the repayment, satisfaction, or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in any connection with that extension of credit.

(5) To collect an extension of credit means to induce in any way any person to make repayment thereof.

(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(7) An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence

or other criminal means to cause harm to the person, reputation, or property of any person.

(8) The term "State includes the District of Columbia, the Commonwealth of Puerto Rico, and territories and possessions of the United States.

(9) State law, including conflict of laws rules, governing the enforceability through civil judicial processes of repayment of any extension of credit or the performance of any promise given in consideration thereof shall be judicially noticed. This paragraph does not impair any authority which any court would otherwise have to take judicial notice of any matter of State law.

18 U.S.C. SEC. 892 *Making Extortionate Extensions of Credit*

(a) Whoever makes any extortionate extension of credit, or conspires to do so, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, if it is shown that all of the following factors were present in connection with the extension of credit in question, there is prima facie evidence that the extension of credit was extortionate, but this subsection is nonexclusive and in no way limits the effect or applicability of subsection (a):

(1) The repayment of the extension of credit or the performance of any promise given in consideration thereof, would be unenforceable, through civil judicial processes against the debtor

(A) in the jurisdiction within which the debtor, if a natural person, resided or

(B) in every jurisdiction within which the debtor, if other than a natural person, was incorporated or qualified to do business

at the time the extension of credit was made.

(2) The extension of credit was made at a rate of interest in excess of an annual rate of 45 per centum calculated according to the actuarial method of allocating payments made on a debt between principal and interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal.

(3) At the time the extension of credit was made, the debtor reasonably believed that either

(A) one or more extensions of credit by the creditor had been collected by extortionate means, or the nonrepayment thereof had been punished by extortionate means; or

(B) the creditor had a reputation for the use of extortionate means to collect extensions of credit or to punish the nonrepayment thereof.

(4) Upon the making of the extension of credit, the total of the extensions of credit by the creditor to the debtor then outstanding, including any unpaid interest or similar charges, exceed $100.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence of any of the circumstances described in subsection (b)(1) or (b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing the understanding of the debtor and the creditor at the time the extension of credit was made, the court may in its discretion allow evidence to be introduced tending to show the reputation as to collection practices of the creditor in any community of which the debtor was a member at the time of the extension.

18 U.S.C. Sec. 894 *Collection of Extensions of Credit by Extortionate Means*

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof,

shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence at the time the extension of credit in question was made, of the circumstances described in section 892(b)(1) or the circumstances described in section 892(b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement	2
Argument	8
Conclusion	15

CITATIONS

Cases:

Bruton v. *United States*, 391 U.S. 123	9
Dutton v. *Evans*, 400 U.S. 74	9, 10
Lawn v. *United States*, 355 U.S. 339	14
Mutual Life Insurance Co. v. *Hillmon*, 145 U.S. 285	9
Pamplin v. *Mason*, 364 F. 2d 1	14
Russell v. *United States*, 369 U.S. 749	13
United States v. *Boardman*, 419 F. 2d 110, certiorari denied, 397 U.S. 991	12
United States v. *Debrow*, 346 U.S. 374	13
United States v. *Kennedy*, 291 F. 2d 457	11
United States v. *Spock*, 416 F. 2d 165	11, 12

Constitution, statutes and rule:

United States Constitution:	
Fifth Amendment, due process clause	8
Sixth Amendment, confrontation clause	8, 10
18 U.S.C. 2	3
18 U.S.C. 892	3
18 U.S.C. 894(b)	8
18 U.S.C. 894(c)	9
Rule 7(c), Fed. R. Crim. P.	13

Miscellaneous: Page

6 Wigmore, *Evidence* § 1714 (3d ed. 1940) 9

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1438

DANIEL CECERE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 71-1568

ANGELO DECARLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals sitting *en banc* (Pet. No. 71-1438 App., pp. 23a-53a) are re-

ported at 458 F. 2d 358. The panel opinion of the court of appeals (Pet. No. 71-1438 App., pp. 7a-20a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1972. The petition for a writ of certiorari in No. 71-1438 was filed on May 4, 1972. On April 28, 1972, Mr. Justice Brennan extended the time within which to file a petition for certiorari in No. 71-1568 to and including June 3, 1972, and the petition was filed on June 1, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was error to admit into evidence a letter written by the deceased extortion victim, and other oral statements made by him before his death, where the jury was instructed to consider the evidence only for the purpose of determining the victim's state of mind.

2. Whether prejudicial error resulted because the government was permitted to introduce evidence as to the cause of death of the extortion victim.

3. Whether the indictment provided petitioner Cecere with sufficient notice of the crime charged.

4. Whether the conduct of the prosecutor or the trial judge deprived petitioner DeCarlo of a fair trial.

STATEMENT

A six-count indictment returned in the United States District Court for the District of New Jersey

charged petitioners and two others with conspiracies and substantive violations of 18 U.S.C. 892, and 2 (see Pet. No. 71-1438 App. B). The charges related to the making of an extortionate extension of credit to one Louis Saperstein, participation in the use of extortionate means to collect and attempt to collect payments from Saperstein, and participation in the use of extortionate means to punish Saperstein for non-payment.[1] Petitioners were convicted by a jury on all six counts; each was sentenced to a prison term totalling twelve years and was fined $20,000 (JA 913a-917a). A panel of the court of appeals reversed. On rehearing *en banc*, the convictions were affirmed by the full court, two judges dissenting (Pet. No. 71-1438 App., pp. 23a-53a).

1. The evidence, which is detailed in the majority opinion below (Pet. No. 71-1438 App., pp. 24a-27a), showed that, in the late summer of 1967, Gerald Zelmanowitz, who was a securities analyst engaged in arbitrage[2] and the chief government witness at

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[1] The indictment appears on page 12a of the multi-volumed joint appendix (hereinafter JA); a copy of the appendix is being filed herewith. We are also lodging with the Clerk of this Court a copy of the court of appeals' supplemental appendix (SA).

[2] As practiced by Zelmanowitz, arbitrage involved the purchase in Europe of large amounts of foreign-held securities and the simultaneous sale of them in the United States where the high volume of trading on the New York Stock Exchange gave the securities a higher price (JA 101a-102a). A profit could be made only as long as Zelmanowitz avoided an 18% United States tax on the transactions, and for this it was necessary to obtain certain equalization tax forms from the

trial, persuaded Louis Saperstein to invest $50,000 in the arbitrage operation (JA 101a-106a). Enthusiastic over potential earnings, Saperstein suggested that they visit petitioner DeCarlo to procure a $100,000 loan as additional capital (JA 113a-116a). DeCarlo referred them to petitioner Cecere (JA 116a-117a) who declined to make the loan; instead he offered to invest $100,000 on behalf of DeCarlo, co-defendant Joseph Polverino and himself, and to recall and transfer to the operation a $50,000 loan that the three men had earlier made to Saperstein (JA 171a). In exchange for this investment of $150,000, it was agreed that DeCarlo, Cecere and Polverino would receive 50 percent of the profits from the arbitrage business (JA 172a). Saperstein, who remained some $200,000 in debt to petitioners and their associates and who faced heavy weekly "vigorish" (interest) payments (JA 192a),[3] secretly withheld $55,000 of the $150,000 designated for the arbitrage account (JA 252a-253a).

In sixteen days of trading through December 1967, Zelmanowitz made $85,000 in profits for the investors (JA 186a). He was forced to stop his dealings at the end of December 1967, however, because the Internal Revenue Service refused to issue equalization tax forms and his accounts in New York and Switzer-

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Internal Revenue Service (JA 197a). The illegality of the arbitrage operation arose from the need to supply the IRS with false information in order to obtain the forms (SA 54).

[3] Interest on the $50,000 debt alone had come to $800 per week (JA 172a).

land were frozen (JA 197a-198a). In early January 1968, Saperstein told Zelmanowitz that he had fallen behind in his loan payments, that he greatly feared for his life and that he desperately needed funds from the arbitrage account. Zelmanowitz, whose Swiss account had by then been temporarily cleared, permitted him to withdraw $40,000 from that account (JA 222a).[4]

On numerous occasions during the summer of 1968, Saperstein begged Zelmanowitz to lend him money to make interest payments to petitioners and their associates. Threatened with physical harm if he did not make his payments, Saperstein would call Zelmanowitz again and again, "constantly afraid, constantly in despair, constantly in need of money" (JA 254a, 248a-254a). In September 1968, Saperstein briefly went into hiding in New York, apparently out of great fear for himself and his family (JA 257a, 260a). At a meeting on September 13, 1968, arranged to discuss payment of the large sum of money he owed, Saperstein pleaded with petitioner Cecere not to harm him; he offered to commit suicide after taking out a $100,000 life insurance policy naming Cecere as beneficiary if Cecere promised not to harm his family (JA 267a-269a). That same day, Cecere and an aide named "Lenny" drove Saperstein

[4] The New York and Swiss accounts were frozen and unfrozen on several occasions during 1968 (JA 351a). In April 1968, $130,000 of the $133,000 in the Swiss account was withdrawn and deposited in another bank in petitioner Cecere's name (JA 242a-245a). In September 1968, the rest of the money was withdrawn and given to Cecere (JA 276a-279a).

to a place in New Jersey owned by DeCarlo. There Cecere and Polverino savagely beat and kicked Saperstein until he was bloody and unconscious (JA 270a-271a). According to Zelmanowitz, who witnessed the beating, Saperstein looked as though he were dead (JA 270a). DeCarlo entered the room and told Cecere and Polverino to stop beating Saperstein (JA 271a-273a). Saperstein was then taken outside, where DeCarlo told him that if he did not pay $5,000 a week from then on and did not pay the entire sum owed by December 13, 1968, he would be killed (JA 273a-275a).

From this point until his death by acute arsenic poisoning on November 26, 1968, Saperstein lived in fear. Petitioner DeCarlo refused to extend the December 13 deadline, and Saperstein was frequently in a state of depression and deep despair (JA 296a, 394a-395a, 423a).

2. On November 25, 1968, Saperstein mailed to the Federal Bureau of Investigation a letter which he had written. The following portion of that letter was introduced at trial, after the judge had repeatedly given cautionary instructions that its contents could not be considered for the truth of the statements made but could be considered only on the issue of Saperstein's state of mind (JA 574a, 806a-814a):[5]

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[5] Each member of the jury was required to sign an "interrogatory" to the effect that, in arriving at his verdict, the juror had considered the letter, and any other statement of Saperstein's made out of the presence of a defendant, "*only* for the purpose of a determination of [Saperstein's] state of

Federal Bureau of Investigation, Newark, New Jersey.

Gentlemen: I am writing you, maybe others can be helped by my plight. On September 13, 1968 I was severely beaten at a place in the rear of Weiland's Restaurant, Route 22, DeCarlo's headquarters. I was then told and given 3 months until December 13, 1968 to pay the entire accumulated amount under threat of death. Cecere, DeCarlo and Polverino, also stated many times my wife and son would be maimed or killed. Please protect my family—I am sure they mean to carry out this threat.

Last night from my home I called DeCarlo and pleaded for time but to no avail. Over the phone DeCarlo stated unless further monies was [*sic*] paid the threats would be carried out.

Louis B. Saperstein

At the outset of the trial it was stipulated that Saperstein had died on November 26, 1968 (JA 293a-295a). At trial, the county medical examiner who performed an autopsy on Saperstein's body testified that Saperstein died of acute arsenic poisoning (JA 423a), but there was no evidence indicating how the arsenic was administered.

The defense placed two witnesses on the stand. One testified that on November 22, 1968, Saperstein expressed the belief he was suffering from cancer

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mind at the time he made the statements" (See JA 817-818a; Pet. No. 71-1568 App., pp. 1a; 8a, 22a).

(JA 583a-584a). The other claimed to have overheard Saperstein say on the day before his death that someone had sprinkled "some silver stuff" on his food at lunch that day (JA 593a-595a).

ARGUMENT

1*a*. Petitioner Cecere contends that the Saperstein letter, and certain oral statements that were made by Saperstein before his death, were admitted into evidence in violation of the confrontation clause of the Sixth Amendment and of the due process clause of the Fifth Amendment. The claim is essentially that, despite the trial court's repeated admonitions to the jury to consider the contested letter and statements only insofar as they bear on Saperstein's state of mind, the jury improperly disregarded the instructions to this effect and considered the evidence for the truth of the statements made. This argument was unanimously rejected by the full court below. We agree with the court of appeals that there is no reason to assume that the jurors did anything other than what they said they did, *i.e.*, considered the challenged evidence "*only* for the purpose of a determination of [Saperstein's] state of mind * * *" (n. 5, *supra*).

Moreover, as part of its case, the government was required to show that Saperstein feared that nonpayment of the loans would be met by violence or other criminal means (see 18 U.S.C. 894(b)); thus it was for this wholly legitimate purpose that the

questioned letter and statements were admitted.[6] In these circumstances, there is no basis for petitioner's reliance on *Bruton* v. *United States*, 391 U.S. 123, or *Dutton* v. *Evans*, 400 U.S. 74.

Bruton involved the admission at a joint trial of the defendant's out-of-court confession which implicated the other defendant; the confession was concededly inadmissible against the one who had made the statement. In reversing, this Court was careful to point out that no recognized exception to the hearsay rule was there involved, and that its decision intimated "no view whatever that such exceptions necessarily raise questions under the Confrontation Clause" (391 U.S. at 128 n. 3). It held that "in the context of a joint trial [it could not] accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination" (*id.* at 137). In contrast, the Saperstein letter and statements at issue here were admissible against each defendant on the crucial issue of the victim's state

[6] Petitioner erroneously argues (Pet. No. 71-1438, pp. 18-20) that, since Saperstein was unavailable, evidence of his state of mind was not admissible in that it was not "direct evidence" within the intendment of 18 U.S.C. 894(c). The short answer is that statements of Saperstein showing his state of mind did constitute direct admissible evidence. See *Mutual Life Insurance Co.* v. *Hillmon*, 145 U.S. 285, 295-296; 6 Wigmore, *Evidence* § 1714 (3d ed. 1940). Nor is there any indication whatever in the legislative scheme that Congress intended, as petitioners suggest, to limit proof of the victim's state of mind to evidence of the reputation of the lender where the actual testimony of the victim might be unavailable (see Pet. No. 71-1438 App., pp. 14a-15a, n. 3).

of mind, and, as such, were not hearsay evidence.[7] Any possible prejudice—and we think there was none—was plainly outweighed by the letter's great relevance to a key issue in the case. Under the court's careful instructions, the evidence was thus properly admitted.

Nor is anything to the contrary suggested by this Court's decision in *Dutton* v. *Evans*, *supra*, 400 U.S. at 87-89, upholding against a challenge based on the confrontation clause the validity of a Georgia statute providing that a statement made in the concealment stage of a conspiracy may be admitted for the truth of the matter asserted therein. As already noted, the Saperstein letter and statements were introduced, not for the truth of the specific matters asserted therein, but solely to show that the extortion victim was in a state of great fear because of his inability to make payments to petitioner and his associates. *Dutton* thus has no application here.

Petitioner Cecere also asserts that this evidence should have been excluded because as a matter of federal evidentiary law it could only have been used to corroborate testimony that had been given at trial by the victim himself (Pet. No. 71-1438, pp. 16-18). This alleged rule of federal practice is not sup-

[7] As the majority below pointed out, "[r]ather than proving the truth of the matters asserted, the letter was admitted to prove Saperstein's state of mind. The Saperstein letter, thus, was not hearsay in the context of its admission, and, the Sixth Amendment was in no way infringed" (Pet. No. 71-1438 App., pp. 31a-32a, n. 5). See *Dutton* v. *Evans*, *supra*, 400 U.S. at 88.

ported by the cases on which petitioner relies (Pet. No. 71-1438, p. 17). Contrary to petitioner's claim, the Second Circuit in *United States* v. *Kennedy*, 291 F. 2d 457, did not conclude that out-of-court statements by the victim should be admitted only if the victim also testifies. It was there held that proof of the state of mind of the victim is "relevant, indeed essential, to a prosecution for extortion" and "may be evidenced by the victim's own testimony at the trial * * * or, pursuant to a recognized exception to the hearsay rule * * * by statements made by him to others" (291 F. 2d at 458). This view is wholly consistent with the trial court's ruling in the present case.

b. Petitioner DeCarlo argues that, by requesting each member of the jury to sign a form confirming that he had considered the Saperstein letter and statements only for the purpose of determining the victim's state of mind, the court imposed improper pressure on the jurors resulting in a denial of due process. He urges that his conviction should be set aside under the principles of *United States* v. *Spock*, 416 F. 2d 165 (C.A. 1). But, since no objection was made at trial to the use of the form,* petitioner is now in no position to complain on the ground of undue judicial pressure. *See United States* v. *Spock*, *supra*, 416 F. 2d at 182-183. In any event, his point is not well taken.

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* DeCarlo's counsel made the suggestion, ultimately followed by the trial judge, that 12 juror forms rather than one be used (JA 772a-773a).

Unlike the situation in *Spock*, the jury in this case was not directed to return special findings as to the defendant's guilt. In *Spock*, the court of appeals found that such a requirement raised the real danger of judicial pressure on the jury to return a verdict of guilty: "There is no easier way to reach, and perhaps force, a verdict of guilty than to approach it step by step." *United States* v. *Spock*, *supra*, 416 F. 2d at 182. But the form at issue here was not used for the purpose of making or recording any findings. It was used simply as an aspect of the judge's instructions, and was distributed to the jurors for their signatures in an effort to keep the instructions uppermost in their minds and to assure that each would comply with his duty "to apply the law as interpreted by the court * * *." *United States* v. *Boardman*, 419 F. 2d 110, 116 (C.A. 1), certiorari denied, 397 U.S. 991.

2. Petitioner Cecere contends that it was prejudicial error for the trial court to admit testimony regarding the cause of Saperstein's death. This argument was fully considered and properly rejected by the majority below, in an opinion on which we rely here (Pet. No. 71-1438 App., pp. 35a-44a). See also the concurring opinion of Chief Judge Seitz (Pet. No. 71-1438 App., pp. 44a-45a).[9]

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[9] Petitioner DeCarlo's claim that the prosecutor overstepped legitimate bounds by introducing this evidence is but a variant of his attack on the admissibility of the evidence generally. If, as the majority below held, the evidence could properly be admitted, the prosecutor cannot be faulted for introducing it.

3. Petitioner Cecere's challenge (Pet. No. 71-1438, pp. 22-26) to the indictment (JA 12a-16a) is insubstantial. It is settled that an indictment is adequate if it informs the accused of the charge against him with sufficient precision to enable him to prepare his defense, avoid surprise, and plead his acquittal or conviction in bar of any further prosecution for the same offense. *Russell* v. *United States*, 369 U.S. 749, 763-764; *United States* v. *Debrow*, 346 U.S. 374. The indictment in the instant case satisfied this standard; and it plainly met the requirements of Rule 7(c), Fed.R.Crim.P. Each count charged only one offense, made reference to the appropriate statutory provisions, and included the essential facts constituting the offense charged.

Petitioner's claim of prejudice is imprecise. He does not indicate how he was prejudiced by the refusal to grant a bill of particulars. Nor is there any showing how undue surprise could have resulted from the fact that the statutory definitions created alternative possibilities for defining the terms "extension of credit" and "extortionate extension of credit." And petitioner has not indicated any way in which the present indictment hindered him in preparing his defense, or placed him in danger of a second prosecution for the same offense.

4. Finally, petitioner DeCarlo alleges that both government counsel and the trial court directed personal attacks against defense counsel during the trial, and that the trial court committed prejudicial error by releasing during the trial certain overhearings of

DeCarlo, thereby purportedly causing an "avalanche of publicity" (Pet. No. 71-1568, p. 19). These issues were not raised below and pose "no exceptional circumstances" warranting review by this Court. *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16. In any event, they are essentially without substance.

To support his claim that defense counsel was verbally attacked by the court and by government counsel, petitioner simply recites a number of record references (Pet. No. 71-1568, p. 19). An examination of these references, however, reveals that all of the challenged remarks occurred outside the presence of the jury, and they hardly evince the "hostility" attributed to them by petitioner. Indeed, most, if not all, of the incidents referred to deal with other counsel, and, in the context of this hard fought and lengthy trial, do not support a claim of prejudice.

The claim that the release by the court at the outset of the trial of illegal surveillance records prompted such extensive publicity as to deny petitioner a fair trial is not well taken. The jury was sequestered during the entire trial, with no access to radio or newspapers. There is no suggestion that this publicity was in any way brought to the attention of the jury or that it had any influence on the verdict.[10]

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[10] Petitioner's reliance on *Pamplin* v. *Mason*, 361 F. 2d 1 (C.A. 5), is misplaced since there the alleged community prejudice existed well before the jury was chosen.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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